state constitutional violations" if the rights identified in Step One implicate intermediate or strict scrutiny.[28]

Finally, the third step requires courts to compare the pattern of unconstitutional conduct recognized in Step Two against the statute's remedy. The remedy must be "congruent and proportional" to the history of constitutional violations.[29] This limitation derives from the separation of powers embedded in the Fourteenth Amendment. Under § 5, Congress can only enact legislation to "enforce" the substantive provisions, but it cannot define those provisions for itself—that power is left to the judiciary.[30] In *Boerne*, the Court held that Congress exceeded its "remedial and preventive" powers under § 5 by attempting to override the Court's decision in *Smith*.[31]

While § 5 must be congruent and proportional, it does not need to mirror the injury exactly. Congress's enforcement power includes the authority to deter constitutional violations by "prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden" by the Fourteenth Amendment.[32] In other words, § 5 legislation may include a degree of prophylaxis.[33] Determining the outer bound of prophylaxis, though, is not an easy task.

In the Supreme Court's § 5 jurisprudence, the level of scrutiny implicated by the rights identified in Step One has proven to be the dispositive factor in drawing that line. The Supreme Court has held that sovereign immunity abrogation was an incongruent remedy in each case implicating rights subject to rational basis review.[34] But in cases where Congress sought to protect rights subject to heightened scrutiny, the Court held in favor of valid abrogation.[35] This trend can be explained by the strength of the pattern identified at *Boerne*'s second step—a more robust pattern of constitutional violations warrants a more potent remedy. "Though [a] lack of support in the legislative record is not determinative" as to whether a remedy is congruent or not, it tends to determine the outcome because "strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."[36] So abrogating sovereign immunity may be appropriate to address a history of states infringing upon fundamental rights, but it may be an inappropriate response to states rationally discriminating to conserve financial resources.

2. The Post-*Georgia* Common Law Suggests that the Tiers of Scrutiny Decide the Fate of (Most) Applications of Title II Abrogation.

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access to courts. The Court held that it was "clear beyond peradventure" that Title II was appropriate remedial legislation after identifying a range of unconstitutional conduct—including Justice Breyer's list that was rejected in *Garrett*. *Lane*, 541 U.S. at 526-29.

[28] *Hibbs* at 736.

[29] *Lane*, 541 U.S. at 531; *see also Boerne*, 521 U.S. at 520.

[30] *Boerne*, 521 U.S. at 523-24; 535-36.

[31] *Id.* at 532.

[32] *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000).

[33] *Hibbs*, 538 U.S. at 727-28.

[34] *See, e.g.*, *Coleman v. Court of Appeals of Md.*, 566 U.S. 30 (2012) (discrimination on the basis of illness); *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (disability discrimination); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (age discrimination).

[35] *Tennessee v. Lane*, 541 U.S. 509 (2004) (fundamental right of access to courts); *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721 (2003) (sex discrimination).

[36] *Florida Prepaid*, 527 U.S. at 646.

In the immediate aftermath of *Boerne*, a majority of circuit courts held that Title II as a whole abrogated sovereign immunity.[37] The legislative records supporting RFRA and the ADA explain the divergent outcomes. Unlike RFRA, which was passed in naked defiance of the Court's holding in *Oregon v. Smith*,[38] Congress passed the ADA after considering extensive evidence of serious and pervasive discrimination against people with disabilities.[39] Viewing the evidence of unconstitutional conduct with deference to congressional fact-finding,[40] circuit courts generally found the ADA's abrogation of sovereign immunity to be a congruent and proportional remedy.

But the Supreme Court began constricting the *Boerne* test in subsequent cases, affording Congress less deference and imposing an unspoken requirement that the § 5 legislation must implicate rights subject to heightened scrutiny.[41] After the Supreme Court held that Title I of the ADA did not abrogate sovereign immunity in *Bd. of Trustees of the Univ. of Alabama v. Garrett*, almost every single lower court reversed course by holding that Title II did not abrogate sovereign immunity either.[42]

The Supreme Court eventually opined on Title II's validity in two cases, but neither case provided a complete answer. The first case, *Tennessee v. Lane*, featured a pair of individuals who used wheelchairs for mobility.[43] They sued the state of Tennessee for failing to make state courthouses wheelchair-accessible.[44] After the defendant argued that the plaintiffs could not recover damages due to Eleventh Amendment sovereign immunity, the Supreme Court granted certiorari. But instead of evaluating Title II as a whole, the Court only considered the statute "as it applie[d] to the class of cases implicating the fundamental right of access to the courts . . . ."[45]

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[37] *Martin v. Kansas*, 190 F.3d 1120, 1128 (10th Cir. 1999); *Muller v. Costello*, 187 F.3d 298, 311 (2d Cir. 1999); *Amos v. Md. Dep't of Pub. Safety and Corr. Servs*, 178 F.3d 212, 222-23 (4th Cir. 1999); *Kimel v. State Bd. of Regents*, 139 F.3d 1426, 1433 (11th Cir. 1998); *Coolbaugh v. Louisiana*, 136 F.3d 430, 438 (5th Cir. 1998); *Crawford v. Indiana Dep't of Corrs.*, 115 F.3d 481, 487 (7th Cir. 1997); *Clark v. California*, 123 F.3d 1267, 1270-71 (9th Cir. 1997); *but see Alsbrook v. City of Maumelle*, 184 F.3d 999, 1010 (8th Cir. 1999) (holding that Title II was an invalid exercise of § 5 powers).

[38] *See* 42 U.S.C. § 2000bb(b)(1) (stating that the purpose of RFRA was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened").

[39] *See, e.g.*, *Muller v. Costello*, 187 F.3d 298, 308-09 (2d Cir. 1999); *Coolbaugh v. Louisiana*, 136 F.3d 430, 436-38 (5th Cir. 1998); *see also* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 393-94 (documenting the extensive political process that led to the ADA's passage).

[40] *See, e.g.*, *Martin v. Kansas*, 190 F.3d 1120, 1128 (10th Cir. 1999); *Coolbaugh*, 136 F.3d at 435-36; *cf. Boerne*, 521 U.S at 536 ("It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference.") (internal quotation omitted).

[41] *See supra* notes 34-36 and accompanying test.

[42] *Wessel v. Glendening*, 306 F.3d 203, 215 (4th Cir. 2002); *Popovich v. Cuyahoga Cnty. Ct. of Common Pleas*, 276 F.3d 808, 812-16 (6th Cir. 2002) (en banc) (holding abrogation invalid as to equal protection claims); *Reickenbacker v. Foster*, 274 F.3d 974, 983 (5th Cir. 2001); *Garcia v. S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98, 112 (2d Cir. 2001) (holding that Title II exceeds Congress's authority under § 5 to the extent that it authorizes suits against states when there is no evidence of "discriminatory animus or ill will due to disability"); *Thompson v. Colorado*, 278 F.3d 1020, 1034 (10th Cir. 2001).

[43] 541 U.S. 509, 513 (2004).

[44] *Id.* at 513-14. One of the plaintiffs, George Lane, crawled up two flights of stairs in order to attend a criminal hearing. *Id.*

[45] *Id.*at 530-31.

Title II's legislative record included numerous examples of people with disabilities being denied access to courthouses across the country. Because the right of access to courts implicates strict scrutiny, the Court presumed that these instances represented unconstitutional infringements of that basic right.[46] Congress, the Court held, had the power under § 5 to enforce the constitutional right of access to courts and therefore held that Title II abrogated state sovereign immunity as it applied to that fundamental right.[47]

The Supreme Court decided the second Title II abrogation case two years later. In *U.S. v. Georgia*, a prisoner with mobility disabilities sued the state of Georgia and the Georgia Department of Corrections.[48] He alleged that his tiny prison cell was not modified to enable him to shower or use the toilet without assistance and, when assistance was denied, he was forced to sit in his own waste or risk injury trying to reach the amenities.[49] The defendants did not dispute that these conditions of confinement violated the Eighth Amendment.[50] Because the Fourteenth Amendment incorporates the Eighth Amendment against the states, this action also constituted a violation of the Fourteenth Amendment. Despite contentious sparring over the permissible extent of Congress's § 5 powers in previous cases, every Justice agreed that § 5 gave Congress the power to enforce the substantive provisions of the Fourteenth Amendment. Therefore, *Georgia* featured a unanimous holding that "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity."[51]

Georgia's holding was less clear on the status of abrogation in cases where plaintiffs alleged Title II claims that did not also include constitutional violations. In these cases, the Supreme Court provided a three-part test for lower courts to apply on a claim-by-claim basis.[52] Lower courts were instructed to determine which aspects of the State's alleged conduct violated Title II; to what extent such misconduct also violated the Fourteenth Amendment; and insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct was nevertheless valid.[53] The third prong of the *Georgia* test required courts to apply the *Boerne* test.

Lower courts have applied *Lane* and *Georgia* in a somewhat inconsistent manner. The Ninth Circuit, for example, has maintained its pre-*Lane* position that Title II as a whole validly abrogated sovereign immunity. Even after the Supreme Court vacated and remanded the Ninth Circuit's opinion in *Phiffer v. Columbia River Corr. Inst.* after *Lane* was decided,[54] the Ninth Circuit reissued its original opinion by concluding that its "initial resolution of [the] case [was] consistent with *Lane*'s holding."[55] Although the facial approach in *Phiffer* seems to conflict with *Lane*'s as-applied reasoning, the two are reconcilable. The Ninth Circuit could reasonably conclude that the legislative record supporting Title II documents such extensive irrational disability discrimination that abrogation would be congruent and proportional in any context,

[46] *Id.* at 527-29.
[47] *Id.* at 531.
[48] 546 U.S. 151, 154-55 (2006).
[49] *Id.*
[50] *Id.* at 157.
[51] *Id.* at 159.
[52] *Id.*
[53] *Id.*
[54] *Columbia River Corr. Inst. v. Phiffer*, 541 U.S. 1059 (2004).
[55] 384 F.3d 791, 792 (9th Cir. 2004).

regardless of whether a fundamental right like access to courts was implicated or not. *Phiffer* is still routinely cited favorably by the Ninth Circuit and its district courts after *Georgia*.[56]

The Sixth Circuit takes an opposite approach. In *Popovich v. Cuyahoga Cnty. Ct. of Common Pleas*, the Sixth Circuit held that Title II only abrogates sovereign immunity where fundamental rights are implicated under the Due Process Clause.[57] The Sixth Circuit reasoned that Congress could "enforce[e]" due process rights under the Fourteenth Amendment, but it could not "expand[]" states' potential liability under the Equal Protection Clause beyond rational basis review.[58] This holding is not necessarily inconsistent with *Lane* or *Georgia*. Similar to how the Ninth Circuit could find that Title II was supported by a sufficient history of constitutional violations to abrogate sovereign immunity in all contexts, the Sixth Circuit could find the history so lacking that Title II does not abrogate sovereign immunity unless a fundamental right is directly implicated. The Sixth Circuit is essentially applying a strong version of the tiers-of-scrutiny approach—because disability discrimination receives only rational basis review under the Equal Protection Clause,[59] the Sixth Circuit requires fundamental rights to be implicated for Title II to abrogate sovereign immunity.

Most other circuits courts, however, have understood *Lane* and *Georgia* as instructions to evaluate Title II abrogation through an as-applied approach on a case-by-case basis. Some consensus has been reached through common law adjudication—lower courts have generally agreed that Title II validly abrogated sovereign immunity as applied to public education[60] and accessing political information,[61] while Title II did not abrogate sovereign immunity as applied to professional licensing.[62] But such consensus is rare. District courts disagree on whether Title II abrogates sovereign immunity when applied to public facilities,[63] public transportation,[64] and

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[56] *See, e.g.*, *Olson v. Allen*, No. 3:18-cv-001208-SB, 2019 WL 1232834, at *3 (D. Or. March 15, 2019); *Miller v. Ceres Unified Sch. Dist.*, 141 F. Supp. 3d 1038, 1043 (E.D. Cal. 2015); *Okwu v. McKim*, 682 F.3d 841, 845 (9th Cir. 2012).

[57] 276 F.3d 808, 812, 815 (6th Cir. 2002). Although this case was decided before *Lane*, the Sixth Circuit has indicated that it may still be good law. *See Mingus v. Butler*, 591 F.3d 474, 483 (6th Cir. 2010) (declining to explicate the relationship between *Popovich* and *Georgia* because it was not necessary).

[58] *See Popovich*, 276 F.3d at 812.

[59] *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985).

[60] *See Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524 (3d Cir. 2007); *Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006); *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005); *Ass'n for Disabled Ams., Inc. v. Florida Int'l Univ.*, 405 F.3d 954 (11th Cir. 2005); *but see Carten v. Kent State Univ.*, 282 F.3d 391 (6th Cir. 2002) (pre-*Lane* opinion holding that Title II did not abrogate sovereign immunity as applied to public education).

[61] *See Nat'l Ass'n of the Deaf v. Florida*, 980 F.3d 763 (11th Cir. 2020); *Reininger v. Oklahoma*, 292 F. Supp. 3d 1254 (W.D. Okla. 2017).

[62] *See Guttman v. Khalsa*, 669 F.3d 1101 (10th Cir. 2012); *Turner v. Nat'l Council of State Bds. of Nursing*, No. 2:11-cv-02059, 2012 WL 1435295 (D. Kan. 2012); *Roe v. Johnson*, 334 F. Supp. 2d 415 (S.D.N.Y. 2004).

[63] *Compare Smith v. Bd. of Comm'rs of La. Stadium and Exposition Dist.*, 372 F. Supp. 3d 431 (E.D. La. 2019) (holding that Title II does not abrogate sovereign immunity) *with Mason v. City of Huntsville*, No. 5:10-cv-02794, 2012 WL 4815518 (N.D. Ala. 2012) (holding that Title II abrogates sovereign immunity).

[64] *Compare Everybody Counts, Inc. v. Indiana Reg'l Plan. Comm'n*, No. 2:98-cv-00097, 2006 WL 2471974 (N.D. Ind. 2006) (holding that Title II does not abrogate sovereign immunity) *with Mote v. City of Chelsea*, 284 F. Supp. 3d 863 (E.D. Mich. 2018) (holding that Title II abrogates sovereign immunity).

public benefits.[65] Although the applications where courts disagree demonstrate that the tiers of scrutiny do not prove dispositive in every case, many courts rely on the level of scrutiny implicated to guide their holding.

Public education represents an anomaly in Title II abrogation common law. Despite implicating only rational basis review, every circuit court to consider the question after *Lane* has held that Title II validly abrogates sovereign immunity as applied to public education.[66] This aberration can be explained by two unique characteristics.

First, some courts have seemingly imposed a slightly higher standard of review than the traditional rational basis review. The First, Third, and Eleventh Circuits acknowledge that education is not a fundamental right, but distinguish it from other contexts that receive only rational basis review by noting the important role that education plays in society and anti-discrimination case law.[67] This distinction helps courts plausibly avoid tension with the Supreme Court's § 5 jurisprudence, which has never found a statute implicating merely rational basis review to validly abrogate sovereign immunity.[68]

Second, Congress passed legislation targeted at eradicating disability discrimination in public education before enacting the ADA. The Rehabilitation Act, passed in 1973, forbids programs receiving federal funds—including schools—from discriminating against people with disabilities.[69] Two years later, Congress amended the existing Education of the Handicapped Act (EHA) to require schools to provide students with disabilities a "free appropriate public education."[70] The amendment was passed after Congress found that the educational needs of more than eight million children with disabilities were not being met; Congress noted that one million children with disabilities were excluded from public schools entirely, while others were prevented from realizing the full value of the educational experience because the program did not accommodate the children's disabilities.[71] Despite Congress's efforts to curb disability discrimination in education through these two statutes, state statutes and case law from the 1970s and 1980s demonstrate that the problem persisted. Many states excluded children with disabilities

[65] *Compare Buchanan v. Maine*, 377 F. Supp. 2d 276 (D. Me. 2005) (holding that Title II as applied to public mental health services did not abrogate sovereign immunity) *and Zied-Campbell v. Richman*, 2007 WL 1031399 (M.D. Pa. 2007) (holding that Title II as applied to receipt of welfare benefits did not abrogate sovereign immunity) *with Tyner v. Brunswick*, 776 F. Supp. 2d 133 (E.D.N.C. 2011) (holding that Title II as applied to the provision of child welfare services validly abrogated sovereign immunity).
[66] *See supra* note 60.
[67] *See Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 556 (3d Cir. 2007) (quoting First and Eleventh Circuit opinions that identify the importance of education in shaping people's lives); *Toledo v. Sanchez*, 454 F.3d 24, 33 (1st Cir. 2006) (noting that education plays a "fundamental role in maintaining the fabric of society," *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003)); *Ass'n for Disabled Ams., Inc. v. Florida Int'l Univ.*, 405 F.3d 954, 957-58 (11th Cir. 2005) (distinguishing public education by noting that its "importance . . . in maintaining our basic institutions," *Plyler v. Doe*, 457 U.S. 202, 221 (1982)).
[68] *See supra* notes 34-36 and accompanying text.
[69] 29 U.S.C. § 794.
[70] Education of the Handicapped Act, Pub. L. No. 94-142 (current version at Individuals with Disabilities Education Act, 20 U.S.C. § 1400).
[71] *See id.*

from the classroom[72] or mandated institutionalization.[73] And judicial opinions from this era confirm that students with disabilities were denied educational opportunities.[74]

Title II's legislative record reflects this pervasive and longstanding discrimination, even if it did not document it to the fullest extent possible. A 1983 report prepared by the U.S. Commission on Civil Rights, which the Supreme Court cited in *Lane* to establish a pattern of unconstitutional conduct,[75] noted that students were frequently excluded from public schools.[76] Congress heard additional testimony from individual students with disabilities who recounted their experiences of discrimination at all levels of education.[77]

The rare consensus that has formed around abrogation in the public education context provides a model that few other applications can follow. No other application constitutes a fundamental role in society like education does, so they (almost always) rise or fall with the tiers of scrutiny. Even if an application were able to break out of the tiers of scrutiny framework, it would need prior legislative efforts directed at that specific application to differentiate it from other contexts that fail the *Boerne* analysis. Incarceration may be the only application that could satisfy both of these features.

3. By Using the Public Education Context as Model, Title II as Applied to Incarceration Validly Abrogated Sovereign Immunity.

Since the Supreme Court decided *U.S. v. Georgia* in 2006, no appellate court has provided a complete analysis of the *Boerne* framework for Title II as it applies to the incarceration context. This section seeks to fill that void. The incarceration analysis should resemble the analysis for public education because both applications share two unique considerations: rights are implicated that go beyond mere rational basis review, and Congress enacted legislation specifically targeted at eradicating disability discrimination in both contexts before passing the ADA. These unique factors indicate that abrogation is a congruent and proportional response to a longstanding history of disability discrimination in state-managed prisons and jails.

Incarceration implicates a "constellation of rights" at the first step of the *Boerne* test,[78] including the First Amendment, Eighth Amendment, Equal Protection Clause, and the Due Process Clause.[79] But within this collection of rights, various standards of scrutiny are applied. Strict scrutiny is applied to the fundamental right to due process,[80] which favors abrogation according to

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[72] *Toledo v. Sanchez*, 454 F.3d 24, 37 (1st Cir. 2006) (citing as examples statutes from Alaska, Iowa, and Ohio among others.

[73] *See Brief for the United States as Intervenor* at 20, *Toledo v. Sanchez*, 454 F.3d 24 (2006) (collecting state statutes).

[74] *See Toledo v. Sanchez*, 454 F.3d at 37-38; *see also Tennessee v. Lane*, 541 U.S. 509, 525 (listing cases of disability discrimination in public education as part of "a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities").

[75] *Tennessee v. Lane*, 541 U.S. 509, 527 (2004).

[76] *See* U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 28-29 (1983) (cited by the First Circuit in *Toledo v. Sanchez*, 454 F.3d 24, 38 (1st Cir. 2006)).

[77] *See generally* 2 Staff of House Comm. on Education and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* (Comm. Print 1990) (cited by the First Circuit in *Toledo v. Sanchez*, 454 F.3d 24, 38 (1st Cir. 2006)).

[78] *U.S. v. Georgia*, 546 U.S. 151, 162 (2006) (Stevens, J., concurring).

[79] *See, e.g.*, *Chase v. Baskerville*, 508 F. Supp. 2d 492, 499-500 (E.D. Va. 2007).

[80] *See Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).

the Supreme Court's emphasis on the tiers of scrutiny.[81] However, the Supreme Court has relaxed the standard of review for prisoners' claims under the First Amendment and the fundamental right of access to courts—both of which are subject to strict scrutiny outside of prison walls—by allowing prison regulations to infringe upon these fundamental rights so long as the regulations are reasonably related to a legitimate penological interest.[82]

The Eighth Amendment falls outside of the tiers-of-scrutiny framework. Most Eighth Amendment claims are adjudicated under a "deliberate indifference" standard, which requires prison officials to knowingly or recklessly disregard a "sufficiently serious" risk to an incarcerated person's health or safety.[83] And unlike other constitutional rights, the Eighth Amendment imposes affirmative obligations on states—they must provide food, clothing, shelter, medical care, and reasonable safety for people that are incarcerated.[84] These affirmative obligations impose greater liability on states than rights subject to mere rational basis review. Under the rational basis test, financial considerations will almost always furnish a permissible reason for declining to provide an accommodation.[85] But under the Eighth Amendment, states cannot, for example, refuse to provide an accessible toilet to an incarcerated individual by arguing that the accommodation would cost money.[86]

There is, unfortunately, an extensive history of individuals with disabilities being subjected to cruel and unusual conditions in prisons and jails in violation of their Eighth Amendment right. Congressional hearings and case law spanning more than two decades document these deprivations.[87]

Similar to the education context, Title II was enacted after two previous legislative attempts failed to eradicate disability discrimination in prisons and jails. The Rehabilitation Act of 1973 proscribed any program receiving federal funds from discriminating against people with disabilities.[88] But the misconduct persisted. Seeking a more targeted solution, Congress passed the Civil Rights of Institutionalized Persons Act (CRIPA) seven years later in 1980.[89] This Act authorized the U.S. Attorney General to bring a civil lawsuit against state institutions—including prisons and jails—that subjected institutionalized people to "egregious or flagrant[ly]" unconstitutional conditions.[90] CRIPA's legislative history documented many examples of state prisons failing to provide accommodations for medical needs, including an incarcerated individual with mobility impairments developing bed sores that became infested with maggots because medical staff failed to change his bandages.[91] Congress also heard testimony that incarcerated

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[81] *See supra* notes 34-36 and accompanying text.
[82] *Turner v. Safley*, 482 U.S. 78, 89 (1987).
[83] *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994).
[84] *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989).
[85] *Tennessee v. Lane*, 541 U.S. 509, 547 (2004) (Rehnquist, C.J., dissenting).
[86] *See, e.g.*, *LaFaut v. Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (Powell, J., sitting by designation).
[87] The Supreme Court has relied upon the legislative history of the statute at issue as well as case law and legislative history from prior statutes to establish a pattern of unconstitutional conduct at Step Two of the *Boerne* analysis. *See supra* notes 23-25 and accompanying text.
[88] *See supra* note 69.
[89] 42 U.S.C. § 1997.
[90] 42 U.S.C. § 1997(a).
[91] *See Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 95th Cong. 1067 (1977).

people with psychiatric disabilities were often provided inadequate mental health treatment[92] and were frequent targets of physical abuse, including sexual assault.[93]

CRIPA's implementation revealed the pervasiveness of disability discrimination in institutions nationwide. In the five years after CRIPA was passed, more than 25 prisons and jails were investigated for egregious conditions of confinement. While some of these institutions were ultimately reformed, case law from this era demonstrates that CRIPA did not resolve the discrimination. Lawsuits decided between 1980 and 1990 show that prison officials failed to accommodate the mobility needs of prisoners with disabilities,[94] failed to protect prisoners with disabilities from physical harm,[95] and failed to provide adequate health care.[96] The Supreme Court in *Tennessee v. Lane* explicitly recognized this massive amount of litigation by identifying the "penal system" as an area where lower courts have "document[ed] a pattern of unequal treatment."[97]

The ADA was enacted against this 20-year backdrop of legislation and litigation chronicling a pervasive trend of people with disabilities being deprived of their constitutional rights in prisons and jails. The ADA's own legislative record supports this by providing a few examples. The same 1983 Civil Rights Commission report that featured prominently in education

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[92] *See Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 95th Cong. 293 (1977).

[93] *See Civil Rights of the Institutionalized: Hearings on S. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 96th Cong. 474 (1979) (statement of the National Prison Project).

[94] *See, e.g.*, *Johnson v. Hardin County*, 908 F.2d 1280, 1284 (6th Cir. 1990) (denial of crutches to prisoner with a disability violated Eighth Amendment); *Leach v. Shelby Cnty. Sheriff*, 891 F.2d 1241, 1243-44 (6th Cir. 1989) (several days' denial of appropriate mattress, bathing, and catheter supplies to a prisoner with paraplegia violated Eighth Amendment); *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980) (finding an Eighth Amendment violation for delaying or refusing to provide a variety of accommodations).

[95] *See, e.g.*, *Parrish v. Johnson*, 800 F.2d 600, 605 (6th Cir. 1986) (prison guard violated Eighth Amendment when he assaulted a prisoner with paraplegia and forced him to sit in his own feces); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1346 (S.D. Tex. 1980) (failure to protect prisoners with mental impairments from abuse and physical harm by other prisoners violated Eighth Amendment), *aff'd in relevant part*, 679 F.2d 1115 (5th Cir. 1982).

[96] *See, e.g.*, *Wellman v. Faulkner*, 715 F.2d 269, 272-73 (7th Cir. 1983) (finding an Eighth Amendment violation for the denial of adequate psychiatric care to prisoners with mental illness); *Ramos v. Lamm*, 639 F.2d 559, 577-78 (10th Cir. 1980) (finding an Eighth Amendment violation where the denial of adequate mental health care resulted in suffering, suicides, and self-mutilation by inmates); *Tillery v. Owens*, 719 F. Supp. 1256, 1302-03 (W.D. Pa. 1989) (finding an Eighth Amendment violation for the inadequate care of "serious mental illness"), *aff'd*, 907 F.2d 418 (3d Cir. 1990); *Cody v. Hilliard*, 599 F. Supp. 1025, 1058-59 (D.S.D. 1984) (denial of adequate mental health care to inmates with "serious psychiatric needs" violated Eighth Amendment), *rev'd on other grounds*, 830 F.2d 912 (8th Cir. 1987) (*en banc*); *Balla v. Idaho State Bd. of Corr.*, 595 F. Supp. 1558, 1569 (D. Idaho 1984) (State violated Eighth Amendment by providing "[l]ittle or no psychiatric care or assistance" to prisoners with serious mental illnesses).

[97] *Tennessee v. Lane*, 541 U.S. 509, 525 n.11 (2004) (citing as examples *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987) (paraplegic prisoner unable to access toilet facilities); *Schmidt v. Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999) (double amputee forced to crawl around the floor of jail); *Key v. Grayson*, 179 F.3d 996 (6th Cir. 1999) (deaf prisoner denied access to sex offender therapy program allegedly required as precondition for parole)).

cases[98] that was relied upon in *Lane*[99] noted that prisoners with disabilities faced "[i]nadequate treatment and rehabilitation programs in penal and juvenile facilities," "[i]nadequate ability to deal with physically handicapped accused persons and convicts (e.g., accessible jail cells and toilet facilities)," and "[a]buse of handicapped persons by other inmates."[100] A Task Force that was created to gather information for the ADA, and whose findings were also relied upon by the Supreme Court in *Lane*,[101] identified multiple instances of states failing to provide adequate medical and psychiatric treatment to incarcerated individuals with disabilities,[102] denying interpretive services to prisoners with hearing impairments,[103] and putting individuals with disabilities in situations where they were at risk of abuse by other prisoners.[104] The House Judiciary Committee report also noted that inadequate medical treatment was provided to incarcerated people with disabilities, often exacerbating underlying issues.[105]

Congress's abrogation of state sovereign immunity in Title II of the ADA was a congruent and proportional response to this longstanding, persistent pattern of discrimination against incarcerated individuals. The examples of unconstitutional discrimination in Title II's legislative history provide a glimpse into what had been documented in CRIPA's legislative history and dozens of judicial opinions.

Moreover, like in the public education context, incarceration presents two unique factors that distinguish it from other applications that have failed. First, because Eighth Amendment rights are implicated, states face greater scrutiny than they would under rational basis review. By raising the level of scrutiny even slightly, the rational-basis death knell can be avoided like it was in the public education context. Second, like in education, Congress attempted to eliminate disability discrimination in prisons through prior legislation, even though the prior legislation ultimately proved insufficient.

Other statutory constraints provide limiting factors that prevent Title II from exceeding its permissible prophylactic range. The Prison Litigation Reform Act requires incarcerated plaintiffs to suffer a physical injury[106] and exhaust their administrative remedies[107] in order to recover damages. These prerequisites would filter out most claims that raise issues of rational discrimination, such as making a TV lounge wheelchair accessible. The Title II claims that could

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[98] *See supra* note 76.
[99] *Lane*, 541 U.S. at 527.
[100] U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 168 (1983).
[101] *Id.*
[102] *Garrett* at 393 (Alaska) (jail failed to provide person with disability medical treatment); *Id.* at 400 (Delaware) (state criminal justice system failed to provide psychiatric treatment).
[103] *Id.* at 405 (Illinois) (deaf people arrested and held in jail overnight without explanation because of failure to provide interpretive services); *Id.* at 409 (Maryland) (public libraries, state prison, and other state offices lacked telecommunications devices for the deaf).
[104] *Id.* at 414 (New Mexico) (prisoners with developmental disabilities subjected to longer terms and abused by other prisoners in state correctional system).
[105] H.R. REP. NO. 101-485, pt. 3, at 50 (1990) ("Often, after being arrested, they are deprived of medications while in jail, resulting in further seizures.").
[106] 42 U.S.C. § 1997e(e); *see also Cassidy v. Ind. Dep't of Corr.*, 199 F.3d 374, 376-77 (7th Cir. 2000) (holding that the physical-injury requirement of § 1997e(e) applies to ADA claims); *Robinson v. Corr. Corp. of Am.*, 14 Fed. App'x 382, 383-84 (6th Cir. 2001) (same); *Pierce v. Cnty. of Orange*, 526 F.3d 1190, 1223-24 (9th Cir. 2008) (same).
[107] 42 U.S.C. § 1997e(a); *see also O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1061-62 (9th Cir. 2007) (holding that 1997(e)(a) applies to ADA claims); *Jones v. Smith*, 266 F.3d 399, 400 (6th Cir. 2001) (same).

proceed would resemble Eighth Amendment claims, even if they did not always state a valid constitutional claim. For example, the Eighth Amendment requires prison officials to provide "humane conditions of confinement,"[108] but multiple circuit courts have found that denying access to showers for as long as two weeks does not violate the Eighth Amendment.[109] Because this would likely constitute a Title II violation, the statute does include a degree of prophylaxis beyond requirements of the Eighth Amendment. But the prophylactic reach falls within Congress's ability to "prohibit[] a somewhat broader swath of conduct" in order to deter violations of the Eighth Amendment.[110] Congress did not redefine the Eight Amendment, as it would be inhumane to withhold showers from prisoners with disabilities for months on end. Congress simply proscribed conduct that barely satisfies the Eighth Amendment's constitutional floor in order to deter state prisons from committing the actual constitutional violations.

Additionally, states would not be exposed to undue financial liability. The implementing regulations for Title II require states to make only "reasonable modifications" that would not "fundamentally alter the nature of the service, program, or activity."[111] This embedded flexibility allows for courts to consider factors like financial feasibility and deference to prison officials' expertise, which further limits the liability that states would face.

[108] *Farmer v. Brennan*, 511 U.S. 825, 83 (1994).
[109] *See, e*.g., *Davenport v. DeRobertis*, 844 F.2d 1310, 1316-17 (7th Cir. 1988) (limiting prisoners in segregation to one shower per week did not violate Eighth Amendment); *Rice v. King Cnty.*, 243 F.3d 549 (9th Cir. 2000) (unpublished table decision) (denial of shower for ten days not a serious deprivation).
[110] *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000).
[111] 28 CFR § 35.130(b)(7) (1998).

Applicant Details

First Name	**Dan**
Middle Initial	**J**
Last Name	**Kieselstein**
Citizenship Status	**U. S. Citizen**
Email Address	**dank1474@gmail.com**
Address	**Address** Street **323 W. 21st St., Apt. 3** City **New York** State/Territory **New York** Zip **10011** Country **United States**
Contact Phone Number	**7089839289**

Applicant Education

BA/BS From	**Tulane University**
Date of BA/BS	**May 2012**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 11, 2018**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Civil Rights-Civil Liberties Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Jongco, Angelica
ajongco@publicadvocates.org
973-204-5263

Fallon, Richard
rfallon@law.harvard.edu
617-495-3215

Klarman, Michael
mklarman@law.harvard.edu
617-495-7646

This applicant has certified that all data entered in this profile and any application documents are true and correct.

DANIEL JASON KIESELSTEIN
323 W. 21st St. Apt. 3, New York, NY 11238 • dkieselstein@jd18.law.harvard.edu • (708) 983-9289

February 22, 2022

The Honorable Jane L. Kelly
United States Court of Appeals, Eighth Circuit
United States Courthouse
111 Seventh Avenue, SE
Cedar Rapids, IA 52401-2101

Dear Judge Kelly:

I write to express my strong interest in a clerkship in your chambers starting in the fall of 2023. I am a 2018 graduate of Harvard Law School, former public defender, and Chicago native. I am currently in the midst of a two-year clerkship with the Hon. Laura Taylor Swain, Chief Judge of the Southern District of New York. I have deeply enjoyed the clerkship experience and hope to clerk at the appellate level. Ultimately, I hope to work on complex litigation, with a focus on appellate matters. If in private practice, I would place great emphasis on pro bono work.

I am familiar with your public service work at the Office of the Federal Public Defender in the Northern District of Iowa. I believe that our shared commitment to public interest would make me a good fit for your office.

As my resume shows, I offer strong experience as a legal researcher and writer, and a lifelong commitment to public service. As a public defender, I drafted numerous motions on a variety of grounds, appeared in court on a near daily basis, and demonstrated the organizational skills necessary to handle a triple-digit caseload. At Public Advocates, I analyzed state civil procedure rules regarding ongoing litigation against the Los Angeles Unified School District and studied options to reform California's complex and largely untested regulatory frameworks governing special education teacher credentialing. In the Peace Corps, I cultivated my passion for public service and learned the resiliency necessary to work in new environments with a steep learning curve.

Attached are my resume, law school grade sheet, and two writing samples. The following people have offered to serve as references:

- Hon. Chief Judge Laura Taylor Swain, Southern District of New York, laura_taylor_swain@nysd.uscourts.gov, 212-805-0417
- Linda Hoff, Deputy Managing Director, Brooklyn Defender Services, lhoff@bds.org, 917-592-2121

You will separately be receiving letters of recommendation from the following people:

- Prof. Michael Klarman, Harvard Law School, mklarman@law.harvard.edu, 617-495-2917
- Prof. Richard Fallon, Harvard Law School, rfallon@law.harvard.edu, 617-495-3215
- Angelica Jongco, Deputy Managing Attorney, Public Advocates, ajongco@publicadvocates.org, 973-204-5263

I would welcome any opportunity to interview with you. Thank you in advance for your consideration.

Sincerely yours,

Daniel Kieselstein

Dan Kieselstein

DANIEL JASON KIESELSTEIN

323 W. 21st St., New York, NY 11238 • dkieselstein@jd18.law.harvard.edu • (708) 983-9289

EDUCATION

HARVARD LAW SCHOOL, J.D. May 2018
Honors: Office of Clinical and Pro Bono Programs Recognition: Over 1,000 hours of Pro Bono Service
Activities: ACLU of Harvard Law School, Co-President
Clemency Project, 2014
Harvard Civil Rights and Civil Liberties Law Review – Sub-citer

TULANE UNIVERSITY, B.A. *cum laude*, Departmental Honors in Political Economy, June 2012

EXPERIENCE

SOUTHERN DISTRICT OF NEW YORK, *Judicial Clerk*, New York, New York July 2021 – Present
Law Clerk to the Hon. Laura Taylor Swain, Chief Judge of the Southern District of New York. Duties include research, and written and oral analytical work in connection with motion practice and other court matters.

BROOKLYN DEFENDER SERVICES, *Staff Attorney*, Brooklyn, NY Fall 2018 – June 2021
Represented hundreds of clients in misdemeanor and felony matters in Criminal and Supreme Court. Successfully argued for suppression of evidence in a pretrial hearing. Conducted numerous investigations and coordinated with attorneys from a variety of other practice areas to provide comprehensive representation to clients.

CRIMINAL JUSTICE INSTITUTE, *Student Attorney*, Cambridge, MA Fall 2017 – Spring 2018
Defended, as primary counsel, 4 clients in 6 cases charging a variety of criminal offenses. Successfully argued for a finding of no violation in a probation hearing. Secured dismissal of multiple charges against a juvenile client charged with assault and battery and felony destruction of property. Interviewed witnesses and prepped a full trial binder for a separate assault and battery case, which was dismissed. Conducted plea negotiations.

BROOKLYN DEFENDER SERVICES, *Legal Intern*, Brooklyn, NY Summer 2017
Conducted client interviews, DATs, and arraignments. Prepared numerous legal memoranda in support of pre-trial motions regarding facial sufficiency, admissibility of evidence, and other topics. Organized trial materials and helped formulate legal defenses in a case charging attempted murder of a police officer.

ACLU OF HARVARD LAW SCHOOL, *Co-President*, Cambridge, MA Spring 2017 – Spring 2018
Developed new recruitment strategy, taking the branch from inactive to a 120-student membership in one month. Divided members into 15 subject-focused teams responsible for soliciting assignments through outreach to ACLU National Office subdivisions, non-ACLU litigation organizations, HLS faculty, and others.

HARVARD DEFENDERS, *Strategic Partnerships Coordinator/Attorney*, Cambridge, MA Fall 2015 – Fall 2017
Elected member of the board. Set up a criminal help desk at a nearby homeless shelter to access hard-to-reach populations. As a student attorney, defended indigent clients in five cases, three times as first seat.

PUBLIC ADVOCATES, *Legal Intern*, San Francisco, CA and Cambridge, MA Winter – Spring 2017
Conducted legal research in support of pending litigation against the Los Angeles Unified School District regarding implementation of California's Local Control Funding Formula (LCFF) education law. Drafted requests for judicial notice and cite-checked cases in a motion for demurrer from opposing counsel. Wrote a legal memo on credentialing requirements for California special education teachers. Analyzed School District Local Control Accountability Plans (LCAPs) for LCFF compliance.

ADVANCEMENT PROJECT, *Legal Intern*, Washington, DC Summer 2016
Conducted legal research on topics relating to immigrant justice, criminal justice and mass incarceration, and voting rights. Wrote legal memos on judicial interpretation of 18 U.S.C. 242, compliance of various state laws with Supreme Court jurisprudence, application of state laws governing municipal power, and others. Wrote a policy memo proposing reforms to driver's license laws in Florida imposing disparate burdens upon people of color, undocumented people, and the poor. Briefed numerous cases regarding voting rights and affirmative action. Wrote Know Your Rights literature for parents of suspended or expelled students in Louisiana schools.

PEACE CORPS RWANDA, *Education Volunteer*, Mpanda, Rwanda Fall 2012 – Spring 2015
Implemented USAID-funded sanitation project to improve access to clean drinking water in six villages. Created Community Hygiene Clubs in 9 villages. Co-founded annual financial education and microfinance program implemented in over 2,000 rural households. Established two libraries. Taught high school English.

INTERESTS

Travel, history, and basketball. I speak Kinyarwanda (adv.), French (intermediate), and Spanish (intermediate).

HARVARD LAW SCHOOL - STUDENT SELF SERVICE

Unofficial Transcript

Daniel J Kieselstein 6/28/2018

3L, Section 3

Fall 2015 Term: Sep 2 - Dec 22

Course Code	Title	Primary Instructor	Grade	Credits
1000	Civil Procedure 3	Rubenstein	P	4.00
1001	Contracts 3	Kennedy	P	4.00
1002	Criminal Law 3	Lanni	P	4.00
1004	Property 3	Smith	P	4.00
1006	First Year Legal Research and Writing 3B	Goldberg	P	2.00
			Subtotal:	18.00

Winter 2016 Term: Jan 4 - Jan 22

Course Code	Title	Primary Instructor	Grade	Credits
1007	Problem Solving Workshop G	Shay	CR	2.00
			Subtotal:	2.00

Spring 2016 Term: Jan 25 - May 13

Course Code	Title	Primary Instructor	Grade	Credits
1003	Legislation and Regulation 3	Rowell	P	4.00
1005	Torts 3	Dorfman	P	4.00
1021	International Law in the US Legal System	Goldsmith	P	4.00
1006	First Year Legal Research and Writing 3B	Goldberg	H	2.00
2747	Systemic Justice	Hanson	P	4.00
			Subtotal:	18.00

Fall 2016 Term: Aug 31 - Dec 20

Course Code	Title	Primary Instructor	Grade	Credits
2079	Evidence	Whiting	H	3.00
2689	Innovation in Legal Education and Practice	Westfahl	H	2.00
2453	Constitutional History II: From Reconstruction to the Civil Rights Movement	Klarman	H	3.00
2101	Global Law and Governance	Kennedy	H	4.00
			Subtotal:	12.00

Winter 2017 - Spring 2017 Term: Jan 3 - May 12

Course Code	Title	Primary Instructor	Grade	Credits
8001	Child Advocacy Clinic	Bartholet	H	6.00
			Subtotal:	6.00

Spring 2017 Term: Jan 23 - May 12

Course Code	Title	Primary Instructor	Grade	Credits
2142	Labor Law	Sachs	P	4.00
2314	Criminal Justice Workshop	Lanni	H	2.00
2021	Child Advocacy Clinical Seminar	Bartholet	H	2.00
			Subtotal:	8.00

Fall 2017 Term: Aug 30 - Dec 19

Course Code	Title	Primary Instructor	Grade	Credits
2249	Trial Advocacy Workshop	Sullivan	CR	3.00
2036	Constitutional Law: Separation of Powers, Federalism, and Fourteenth Amendment	Rahman	P	4.00
			Subtotal:	7.00

Fall 2017 - Winter 2018 Term: Aug 30 - Jan 19

Course Code	Title	Primary Instructor	Grade	Credits
2261	Criminal Justice Institute: Defense Theory and Practice	Umunna	H	4.00
8002	Criminal Justice Institute: Criminal Defense Clinic	Umunna	P	5.00
			Subtotal:	9.00

Spring 2018 Term: Jan 22 - May 11

Course Code	Title	Primary Instructor	Grade	Credits
2086	Federal Courts and the Federal System	Fallon	H	5.00
8002C	Criminal Justice Institute - Advanced Clinical	Umunna	H	3.00
2050	Criminal Procedure: Investigations	Crespo	P	4.00
			Subtotal:	12.00

Actual Total: 92.00

THE FIRST 50 YEARS PUBLIC ADVOCATES MAKING RIGHTS REAL

March 13, 2022

Dear Judge:

Re: Letter of Recommendation for Dan Kieselstein

It is with great pleasure that I highly recommend Dan Kieselstein to you as a judicial law clerk. Dan was a law school intern under my supervision at Public Advocates from December 2016 to May 2017. During that time, he was a valuable member of Public Advocates' Education Equity Team, contributing to our work towards an equitable public school education for all students. I admired his clear and precise legal research and writing, passion for the work, and ability to connect easily with others.

As a former judicial law clerk to the Honorable Denny Chin, I am familiar with the rigor required of these positions and have no doubt that Dan would thrive in this role. In particular, he is an excellent legal researcher and writer. While Dan interned with us, we were in the thick of a first-of-its-kind lawsuit against Los Angeles Unified School District (LAUSD) regarding LAUSD's failure to abide by a new state school funding law that guaranteed increased resources for high-need students. Dan provided critical research and writing support on a wide variety of issues, demonstrating exceptionally strong research and writing skills and an ability to produce work independently on a short timeline.

For example, Dan's meticulous review of the school district's demurrer was foundational to our opposition brief. He was able to quickly summarize the relevant cases, identify the opposition's mischaracterizations and overstatements of law and directly draft excerpts for use in our brief. He also researched the question of whether the California Department of Education was an indispensable party to the litigation – a key threshold issue as to whether the case could proceed. Finally, he wrote a memo analyzing a new state civil procedure statute to determine whether LAUSD could demur a second time. All of these assignments contributed directly to our litigation.

In another project, Dan wrote an extensive memo outlining the ways in which California's special education credentialing process may violate California law. This project involved extensive analysis of existing law and application to existing practices. He designed a proposed advocacy strategy that incorporated both legal and policy tools to challenge existing practice.

Public Advocates Inc. 131 Steuart Street, Suite 300, San Francisco, CA 94105-1241 415.431.7430 fax 415.431.1048 www.publicadvocates.org
Sacramento Office 1225 Eighth Street, Suite 435, Sacramento, CA 95814-4809 916.442.3375 fax 916.389.2741

Over the course of his internship, Dan worked efficiently in a remote setting. While the first three weeks of his internship were in person in California, he spent the balance of his time attending school and assisting our office remotely. Dan was very good at managing multiple projects and deadlines and working independently. While he required minimal supervision to produce high-quality work, Dan also exercised good judgment in communicating and asking questions. Dan also provided rapid research and analysis on a series of other complex legal questions, including issues regarding joinder of parties, statute of limitation analysis, judicial notice, and collateral attack on administrative rulings.

In addition to his intellect and productivity, Dan also brings a great level of humility and humanity to the work. At Public Advocates, we often work in direct partnership with impacted low-income communities. Dan was comfortable in meetings with community stakeholders and adapted legal materials to more accessible formats for use by parents of students affected by our litigation. These qualities will serve him well when interacting with litigants and their counsel on behalf of chambers.

In short, Dan will be a great asset to your chambers. He has a rare combination of strong legal research and writing skills, work ethic and ability to connect well with diverse people. Out of dozens of law clerks I have worked with in my years of practice, he stands out in his legal skills, work ethic and good nature. I highly recommend him for a judicial clerkship. Please contact me with any questions.

Sincerely,

Angelica K. Jongco
Deputy Managing Attorney
Public Advocates
ajongco@publicadvocates.org
973-204-5263

Richard H. Fallon, Jr.
HARVARD LAW SCHOOL
1545 Massachusetts Avenue
Areeda Hall 330
Cambridge, MA 02138

February 21, 2022

The Honorable Jane Kelly
United States Courthouse
111 Seventh Avenue, SE
Cedar Rapids, IA 52401-2101

Dear Judge Kelly:

I write to recommend Daniel Kieselstein, who has recently applied for a position as one of your law clerks.

I got to know Dan during his third year at Harvard Law School, when he enrolled in my course on the Federal Courts and the Federal System. In that notoriously difficult class, Dan impressed me greatly. Throughout the semester, he was always poised, prepared, and articulate when I cold-called on him. In addition, he played a very valuable role – unsolicited by me – as an informal student leader and representative in asking for clarification of points that I had failed to make clearly. It was almost palpable in the classroom that his fellow students valued his interventions.

In out-of-class conversation, I found Dan to be sincere, intelligent, and public-spirited. During law school, he devoted tens of hours each week to participation in clinics and public interest organizations. This commitment followed three post-college and pre-law school years as a Peace Corps volunteer.

In touting Dan as highly talented, I might say a few words about his Harvard Law School transcript. Coming to law school after three years in the Peace Corps, he performed very creditably during his first year, but not outstandingly well. Beginning in his second year, however, Dan consistently earned grades that signify high aptitude for legal analysis and writing.

A further mark in Dan's favor comes from his post-law school experience. Following his graduation from Harvard Law School, Dan did a three-year stint as a lawyer in the Brooklyn Defender Services. Equally enriching, I am sure, is his current service as a law clerk to Chief Judge Laura Taylor Swain of the Southern District of New York. As a result of his practice and clerkship experiences, Dan would come to your chambers with an extraordinary perspective on the legal system and the judicial process.

I would add, too, that in my dealings with Dan, I consistently found him to be modest and amiable as well as intellectually gifted. I would expect him to be a very easy person with whom to work.

Overall, putting together everything that I know, I recommend Dan enthusiastically. I would expect him to be an unusually able law clerk who would also, subsequently, build on his clerkship experience to render public service through his legal career.

If I could possibly provide any further information, please do not hesitate to contact me.

Sincerely,

Richard Fallon
Story Professor of Law

Richard Fallon - rfallon@law.harvard.edu - 617-495-3215

February 22, 2022

The Honorable Jane Kelly
United States Courthouse
111 Seventh Avenue, SE
Cedar Rapids, IA 52401-2101

Dear Judge Kelly:

I write in support of the clerkship application of Mr. Daniel Kieselstein, who was a student in my Constitutional History II class ("From Reconstruction to the Civil Rights Movement") in the fall of 2016. Daniel was a stellar contributor to class discussion and wrote an excellent final exam in the course. From what I saw of him that semester, he is bright, articulate, well-prepared, and likeable. Daniel also has displayed an extraordinary commitment to public service as a young adult. I expect that he will make an excellent judicial law clerk.

My Constitutional History class in the fall of 2016 had well over a hundred students in it, but Daniel distinguished himself with his in-class participation, as recorded in this entry from my "diary" for the class:

> Oct. 12: Daniel Kieselstein has been one of the best contributors all year and had a great question today about why exactly the Progressives—as opposed to the Populists—would have been so inclined to support women's suffrage (which was the topic of one of our assignments in this course). I probably thought it was an especially good question because I don't know the answer to it.

For purposes of this letter, I have reread Daniel's Constitutional History exam. On the exam's three questions, he earned, respectively, 3.25 (a B+) and two 3.8s (high A-s). This placed him solidly in the quartile of the class and possibly even the top 15-20 percent. Please allow me to offer a bit more detail regarding Daniel's answers.

The first question consisted of 15 compare-and-contrast questions. For example, one of these questions asked the students to compare and contrast "Justice Hugo Black with Justice John Marshall Harlan (the elder—that is, the Harlan who sat on the Court from 1877 to 1911, not his grandson)." Daniel's response reads: "Both Justices had checkered racial pasts, but became allies of the African-American cause. Harlan dissented in Plessy and Black helped ensure the Brown decision. Harlan, however, still probably believed in segregation in public schools (see Cumming), whereas Black voted to strike it down."

A second such question asked for a comparison of "Justice Oliver Wendell Holmes's majority opinion in Giles v. Harris (1903) with Justice Robert Jackson's dissenting opinion in Korematsu v. United States (1944)." Daniel wrote in response: "Both opinions consider the power of the Court in a situation where its decisions could be nullified, either by southerners (Giles) or by the executive (Korematsu). Holmes avoided nullification by conceding the limits on the Court's power, whereas Jackson argued that it's better to be nullified but set good legal precedent."

Yet another of these questions asked the students to compare and contrast "President Abraham Lincoln's Emancipation Proclamation in 1863 with President Franklin D. Roosevelt's executive order creating the Fair Employment Practices Committee in 1941." Daniel's answer read, "In both cases, a president vindicated the rights of blacks in a way they likely wouldn't have done during peacetime. The Emancipation Proclamation, however, was a measure taken to advance the war effort. FDR's executive order was a concession made to avoid disunity near wartime. The Emancipation Proclamation was also possibly unconstitutional (dubiously justified under War Powers), whereas FDR's executive order clearly fell within the president's authority."

As a final illustration, the students were asked to compare and contrast "the Court's unanimity in Schechter Poultry v. United States (1935) with the Court's unanimity in Brown v. Board of Education (1954)." Daniel wrote in response: "The unanimity is similar because it was a rare instance in which the Justices are unanimous in a holding that was controversial (the National Industrial Relations Act was not popular, but workers protested Schechter). In Schechter, the legal consensus was genuine. In Brown, there wasn't genuine unanimity, but the Justices thought unanimity was an important sign of strength."

Daniel's answers to these compare-and-contrast questions were clear, forceful, economical, and demonstrated an impressive command of the subject matter of the course.

The second question on the exam asked the students to write an essay, based on the course materials, examining "the ambiguous effect of war—both positive and negative—on civil rights and civil liberties." Daniel's response began with the positive effects of war on civil rights. Wars force "marginalized groups into roles they were previously thought incapable of filling." He continued, "Blacks were seen as unqualified for suffrage, non-Christians as having questionable loyalty, and women as best confined to the home. In both world wars, the contributions of these groups to the war effort helped legitimize them as equal members of society entitled to equal rights." This is a strong statement, nicely phrased.

Daniel went on to note the ideological effect of wars—for example, with regard to World War II, as the United States' self-conception "as a free nation fighting Aryan supremacy was difficult to square with widespread anti-Semitism and segregation." Daniel noted that, most importantly, wars changed the views that marginalized groups have of their own place in society. Black men experienced non-discriminatory treatment in Europe and returned to the United States more militant. That militancy also

Michael Klarman - mklarman@law.harvard.edu - 617-495-7646

may have benefitted from the greater leverage that protest can exercise during wartime (as compared with during peacetime), which enabled African-Americans to secure from President Franklin Roosevelt the Fair Employment Practices Commission on the eve of World War II. Further, Daniel observed that backlashes against such militancy can expose violence that underpins racial supremacy, leading to a counter-backlash, such as President Wilson's being pressured into coming out against lynching after World War I.

Next, Daniel turned to negative effects of war on civil rights. Groups sharing commonalities with the enemy nation may lose their rights. Politicians may foment hysteria against such groups, as with Japanese-Americans during World War II, leading to their internment. Also during wars, supporters of rights may face pressure to subordinate their movement to national goals, such as Japanese-American leaders urging Japanese-Americans to accept their internment and thus demonstrate loyalty, or radical feminists fearing that they might undermine the cause of women's suffrage by pressing too hard for it during World War I.

Daniel then turned to the negative effects of war upon civil liberties. He began by accurately noting that the Supreme Court has not done a great job, historically, of protecting civil liberties during wartime. The Justices did not protect radical speech during World War I and only began to protect anarchist and Communist speech in the 1920s and 1930s, when the perceived threat of such speech was greatly reduced. Also during wartime, the Supreme Court has often proved reluctant to cut back on executive power. For example, President Lincoln simply ignored the order in Merryman invalidating his authorization of the suspension of the writ of habeas corpus.

In terms of wars' positive effects on civil liberties, Daniel noted these are often a function of the backlash against the suppression that war produces. Free speech victories in the 1920s and 1930s can be seen as a direct response to government overreach during World War I. Daniel also noted how freedom of religion can expand during and after wars. Some of this is ideological, as illustrated by how a war fought against German theories of Aryan supremacy led Americans to broaden their acceptance of religious minorities, such as Catholics and Jews, after World War II had ended.

Daniel's essay concluded, appropriately, with some general observations distinguishing between groups whose loyalty is not questioned and those who may be enemy aliens or seen as a fifth column sympathetic to the enemy, as well as reiterating the important point about how repression can lead to backlash. In sum, Daniel's answer to Question II was comprehensive, well-organized, well-crafted, and covered an impressive array of examples from the course materials. This answer ranked within the top 15 percent or so of student answers.

Question III was another essay questions. It read, in its entirety: "Over the course of the semester, we have seen various strategies employed by various actors—presidents, Congress, state legislatures and governors, and ordinary citizens—for resisting, evading, and/or limiting the scope of controversial Court decisions. Write an essay canvassing these strategies that covers as wide a swathe of the course as possible. In the course of your discussion, be sure to address the questions of why certain strategies were chosen in certain situations and of which strategies seemed to prove the most effective—and under which circumstances."

Daniel wisely divided his answer into seven or eight discrete strategies. The first was simply ignoring a holding. Here, he noted how the Court in Bailey v. Alabama (1911) struck down coercive labor measures, yet similar laws continued to be enforced in the Deep South for another thirty years. He also noted, on a similar tack, how Oklahoma simply grandfathered its grandfather clause after the Court invalidated it in Guinn v. Oklahoma (1915). He also noted how Lincoln simply ignored Merryman during the Civil War.

A second strategy of resistance to Court rulings was to prevent follow-up litigation or the exercise of rights in the first place through violence or economic reprisal. Here, Daniel noted as an example United States v. Cruikshank (1876), which gave legal sanction to white-on-black violence by holding that the underlying racial massacres could not be prosecuted under federal law. He also noted economic reprisals which made African-Americans reluctant to assert their rights in the first place—a strategy that remained surprisingly effective through the 1950s and 1960s in the Deep South. Daniel also noted the neat point that this observation explains why most civil rights litigation came from slightly less-oppressive border states.

Another resistance strategy was the circumvention of restrictions on race-based discrimination through racial surrogates. His illustration here was the grandfather clause, as well as the South's use of poll taxes to disfranchise most blacks—a strategy that was not curtailed until the passage of the 24th Amendment in the 1960s.

The fourth strategy described by Daniel was to shift race discrimination from the face of the law to its administration. Here, he noted how the Court's ruling in Yick Wo v. Hopkins (1886) was circumvented to prevent black voting and jury service in the South. The Court "cooperated" with such circumvention by refusing to inquire into legislative motive. As illustrations of this point, Daniel noted both the use of literacy tests to prevent black voting and the use of pupil placement laws in the 1950s to prevent school desegregation.

Delay was another strategy of resistance, which was used in response to Brown. Here, Daniel explained how southern school boards would use grade-a-year integration plans or appeal to the courts to allow delays in integration. Such efforts succeeded for a long time.

The sixth strategy noted by Daniel was use of the state action doctrine, such as adopting "private" racially restrictive covenants

after the Court struck down residential segregation laws in Buchanan v. Warley in 1917. He noted the same strategy with regard to white primaries, even after the Court initially struck down the exclusion of blacks from Democratic Party primaries by state law.

As a final strategy of resistance, Daniel noted stripping the Court of jurisdiction or otherwise attempting to intimidate the Justices. Here, Daniel's examples were taking away the Court's jurisdiction in Ex parte McCardle in 1868 to prevent the Court from possibly invalidating Reconstruction, and Roosevelt's Court-packing Plan, which seemed to intimidate the Justices into changing their tack on economic regulation in 1937.

In addition to the comprehensiveness of his answer to Question III, I admired Daniel's organizational strategy of breaking down resistance strategies into seven or eight discrete categories and then offering an effective example or two of each. This answer placed Daniel once again within the top 15 percent or so of student answers.

Finally, it is hard not to be impressed with Daniel's consistent record of public service. He has volunteered six years at a center to help abused children, worked for the Criminal Justice Initiative at HLS as a student attorney, was a board member for Harvard Defenders for two years, worked as a law-student intern at Brooklyn Defender Services (where he worked the last couple of years after graduation), and was co-president of the ACLU of Harvard Law School his 3L year. Daniel also served in the Peace Corps in Rwanda before entering law school.

In sum, Daniel Kieselstein is a bright, thoughtful, hard-working, and well-informed young man who has demonstrated a consistent and profound commitment to public service and improving the welfare of the least advantaged in society. He is a mature, serious-minded, and likeable young man. With the experience he has gained in his current clerkship, he is sure to be an even better judicial law clerk to whoever hires him for a second clerkship. I recommend him to you with great enthusiasm.

Yours sincerely,

Michael Klarman

Michael Klarman - mklarman@law.harvard.edu - 617-495-7646

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WRITING SAMPLE

Drafted August 2020

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Modified to preserve confidentiality of all civilian parties.

CRIMINAL COURT OF THE CITY OF NEW YORK COUNTY OF KINGS: PART DV1

X

THE PEOPLE OF THE STATE OF NEW YORK

NOTICE OF RESPONSE TO PEOPLE'S AFFIRMATION IN OPPOSITION TO MOTION TO DISMISS

- against -

[redacted], Docket No. [redacted]

Defendant

X

PLEASE TAKE NOTICE, that upon the annexed affirmation of DANIEL KIESELSTEIN and the accompanying Memorandum of Law, the undersigned will move for an order dismissing the accusatory instrument pursuant to C.P.L. § 30.30(1), as defective and beyond the speedy trial time, and granting such other and further relief as this Court may deem just and proper.

Dated: Brooklyn, New York
August 18, 2020

Respectfully,

Daniel Kieselstein

Dan Kieselstein
Brooklyn Defender Services
180 Livingston St., 3rd Floor
Brooklyn, New York 11201
817-254-0700 ext. 274

To: Assistant District Attorney
King's County District Attorney's Office
350 Jay Street
Brooklyn, New York 11201

Clerk, Criminal Court of the City of New York
Part DV1

In Support of the Motion to Dismiss

The People offer a pair of arguments to support their claim that the 15-day period between January 1st and January 15th is excludable time, each of which will be addressed here. The first claim is that Ms. [redacted]'s alleged "failure to waive" her discovery amounts to a demand to produce discovery, which the People argue somehow triggers a period of excludable time. The second claim is that the People are automatically entitled to an exclusion on the apparent basis that, under the discovery framework in effect under New York law in 2019, provision of discovery via discovery by stipulation or open file discovery triggered a tolling of the 30.30 clock.

The People's first argument is without merit because (1) under the new discovery law, disclosure of discoverable material under C.P.L. § 240.20 is automatic, not pursuant to a demand; (2) the people do not provide any basis as to why failure to waive discovery amounts to a demand; and (3) even assuming, *arguendo*, that C.P.L. § 245 does not apply retroactively to the period prior to January 1, the People never served a supporting deposition and accompanying statement of readiness on defense counselto stop the speedy trial clock.

First, the People's argument is without merit because discovery under section 245.20 is automatic. That this is clearly stated within the statute is beyond doubt—the section itself is entitled, "Automatic Discovery." The opening section of C.P.L. § 245.20 begins with the phrase "The prosecution shall disclose to the defendant…" before listing the items subject to automatic disclosure. C.P.L. § 245.20(10). As the People note in their motion, "courts 'must interpret a statute so as to avoid an unreasonable or absurd application of the law.'" *People's Motion* at 15, citing *People v. Crespo*, 32 N.Y.3d 176 (2018). The People's proposal, that the Court interpret a statute entitled "Automatic Discovery" as predicated upon Ms. [redacted] 's demand is undoubtedly violative of the *Crespo* principle. It is not contingent upon the demand of the accused, but upon the demand of the law itself.

Second, the People can provide no basis for their assertion that an alleged "failure to waive" automatic discovery (which Ms. [redacted] does not concede) amounts to a demand to produce discovery. C.P.L. § 245.75, the subsection governing waivers of discovery, makes no mention of this concept, which the People appear to wish the Court to write into the law. The People's own assertion cites three cases, *People v Jacobs*, *People v. Celestino*, and *People v. Dorilas*, none of which are analogous to the instant case. In *People v. Jacobs*, the People requested, and received, a tolling of the speedy trial clockin response to the Mr. Jacobs' explicit demand to produce discovery. This case supports the notion thata demand for discovery tolls the speedy trial clock, but provides no support for the notion that a failureto waive discovery somehow amounts to a discovery demand. *People v. Jacobs*, 45 A.D.3d 883 (3d Dept. 2007). In *People v. Celestino*, the Court held that the speedy trial clock was tolled by the initiation of motion practice by Mr. Celestino. "People are entitled to a reasonable period to respond to discovery demands and because the court is entitled to a reasonable period to inspect the grand jury minutes, as the

foregoing were occasioned by defendant's motion practice and were for his benefit." *People v. Celestino*, 201 A.D.2d 91, 95 (1st Dept 1994). Again, this supports the principle that an explicit demand for motion practice or discovery tolls the speedy trial clock. It provides no support for the idea that failing to waive *automatic* (or otherwise) discovery somehow amounts to a demand. *People v.Dorilas* is another case following the exact same pattern—the speedy trial clock here was tolled for a lawful and accepted reason—an adjournment for discovery by stipulation. *People v. Dorilas*, 19 Misc. 3d 75, 76 (App. Term 2d & 11th Jud. Dists. 2008). Ms [redacted]'s case was never adjourned for discovery by stipulation, so *Dorilas*' holding is not relevant. None of the three cases cited by the People to support the proposition that a failure to waive discovery amounts to a "demand to produce" support that claim. Nor do C.P.L. § 245 or C.P.L. § 30.30 make any mention of this idea. On the contrary, appears to have been created entirely by the People.

Having responded to the People's arguments, we now reiterate Ms. [redacted]'s affirmative argument, which is straightforward and consonant with the relevant law: under neither statutory scheme, either pre or post implementation of the 2020 discovery reforms, did the People meet the requirements of C.P.L. § 30.30. Under the 2019 scheme, the People had 90 days from arraignment to serve a supporting deposition and accompanying statement of readiness on defense counsel and the Court, converting the criminal complaint into a valid accusatory instrument. Under the 2020 scheme, the People had 90 days from arraignment to serve a valid Certificate of Compliance and accompanying statement of readiness that demonstrated full compliance with the discovery disclosures imposed upon the People by C.P.L. § 245 and a true and good faith assertion that the People were ready to proceed to trial.

The People's assertion that, because Ms. [redacted] had the ill fortune to have her case straddle these two different schemes, her right to a speedy trial is somehow qualified by an arbitrary 15-day extension, is without merit, deeply prejudicial to Ms. [redacted]'s statutory rights, and profoundly unfair. Uniform application of the law to both pending and new mattes is constitutionally required by the Equal Protection and Due Process Clauses of both the United States Constitution and the New York Constitution. U.S. Const. Amends. V, XIV; NY Const., Art. I, §§ 6, 11. Which scheme applies to Ms. [redacted]'s case is immaterial because, under either scheme, the outcome is the same: the People were not ready for trial within the allotted time and therefore Ms. [redacted]' case, like any other similarly situated under either statutory scheme, must be dismissed.

In Support of Ms. [redacted] 's Objection to the People's Certificate of Compliance

As noted in Ms. [redacted] 's initial motion, the People's Certificate of Compliance was filed despite the existence of significant outstanding discoverable material. This material included:

- A confirmatory photograph of Ms. [redacted], part of a text exchange between Det. Smith and the Complaining Witness

- *Giglio* materials for all 10 police officers listed as potential witnesses
- Precinct information for all 10 police officers listed as potential witnesses
- Memo books for 7 of the 10 police officers listed as potential witnesses

The People argue that their failure to disclose then-existing discoverable material was "inadvertent, and—despite the prosecution's 'exercising due diligence and making reasonable inquiries'—and that the failure itself was unknown to the prosecution." See *People's Motion* at 10. The People's own accounting of the events leading to their failure to provide complete discovery, however, belies this claim.

Applicability of New Legislation

The Defense notes, prior to engaging with this specific case, that the new legislation described under Articles 30 and 245 of the C.P.L. went into effect on January 1, 2020. Taken together, these statutes codify a new and comprehensive framework for discovery compliance and trial readiness. In doing so, they are applicable to all pending proceedings as of their effective date. *See McKinney's Consolidated Laws of N.Y. § 55; Wade v. Byung Yang Kin*, 250 A.D.2d 323 (2d. Dept. 1998). Uniform application of the law to both pending and new matters is constitutionally mandated by the Equal Protection and Due Process Clauses of both the United States Constitution and the New York Constitution (U.S. Const. Amend. V, XIV; NY Const, Art. I, §§ 6, 11).

Confirmatory Photograph of Ms. [redacted]

The text exchange between Ms. [redacted] and Det. Smith containing a confirmatory ID photograph falls within automatic discovery under CPL § 245.20. "All statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to any potential defense thereto…" shall be disclosed by the prosecution to the defense. C.P.L. § 245.20(1)(e).

The People's failure to include a confirmatory photograph of Ms. [redacted] and exchange between the complaining witness and Detective Smith simply cannot be described as "inadvertent" and "despite the prosecution's exercising due diligence and making reasonable inquiries," for two reasons. First, the § 710.30(1)(b) notice provided by the People at arraignment makes clear that the People were aware of theexistence of a confirmatory identification photograph. In that §710.30(1)(b) notice, the People indicated that the complaining witness allegedly identified Ms.[redacted] in a confirmatory text message at 15:06 on 11/6/2019. This fatally undermines the People's claim to "learn [on February 20th] that a confirmatory photo of Ms. [redacted] existed and received the photograph after Detective Smith sent it to the Peopleat 5:31 pm." *See Exhibit A*. It is worth emphasizing that February 20th, 2020, is **103 days post-arraignment**. Had the People referred to their own notices, they would have been made aware of this communication. Their failure to do so—for a period of time greater than the statutory limit for total trial preparation—cannot be considered an exercise of due diligence.

Second, as CPL § 245 makes clear, a confirmatory photograph in the possession of Det. Smith is legally in the possession of the King's County District Attorney's office. "[A]ll items and information related tothe prosecution of a charge in the possession of any New York state or local police or law enforcement agency shall be deemed to be in the possession of the prosecution." C.P.L. § 245.20(2). It cannot be that the prosecution creditably claim to be unaware of photographs and text messages they are deemed legally to be in possession of.

Giglio Materials, Ranks, and Full Names for Police Personnel Listed as Potential Witnesses

In their affirmation, the People give no explanation for their failure to provide *Giglio* materials for seven of the ten officers (PO Gaudio, Sgt. Finamore, Lt. Pelant, PO Staab, Det. McKenna, PO O'Malley, Kevin McCarthy (no rank listed), Jaiyi Wang (no rank listed), Blas Colon (no rank listed) listed in their Certificate of Compliance as potential witnesses in any trial. Indeed, these materials remain outstanding, **282 days post-arraignment**. *Giglio* materials are considered automatic discovery under the C.P.L § 245.20. Per that statute, the prosecution must disclose all information including "that which is known to police or other law enforcement agencies acting on the government's behalf in the case" that tends to "impeach the credibility of a testifying prosecution witness." C.P.L. § 245.20(1)(k). In the instant case, the prosecution listed 10 police personnel as potential witnesses, and provided *Giglio* material for only 3 of them. The prosecution gives no explanation for their (ongoing) failure to provide this material, which is a pre- requisite for a valid Certificate of Compliance and thus for a valid declaration of trial readiness. These materials are invaluable to the defense in preparing its case—they provide impeachment evidence

necessary to adequately cross-examine police witnesses as to their credibility. In their absence, Ms. [redacted] and her representatives cannot make an informed decision about whether to proceed to trial. The absence of these materials alone demands that the People's Certificate of Compliance be deemed illusory.

Beyond failing to provide *Giglio* materials for the seven officers listed above, the People failed to provide adequate identifying information for four of the ten officers listed, again in contravention of the automatic discovery mandates of § 245.20, in this case subsection (1)(d). In that section, the prosecution is specifically required to provide "the names and work affiliation of all law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto, including a designation by the prosecutor as to which of those persons may be called as witnesses." C.P.L. § 245.20(1)(d). In the instant case, the prosecution designated 10 police personnel as potential witnesses. For **none** of these personnel did the prosecution provide a precinct or badge number. For one, Det. McKenna, they did not provide a first name. For three—Kevin McCarthy, Jaiyi Wang, and Blas Colon, they did not provide a rank. It is impossible for the defense to prepare for trial if it does not even have the full names of one potential witness and any identifying information for three others. It is highly unlikely that these four men are the only people with their names (or in Det. McKenna's case, last name) among the 36,000 employees of the New York Police Department. The prosecution cannot claim to have adequately provided Ms. [redacted] with the material necessary to prepare her defense if they do not identify who they plan to call as witnesses. It is equally implausible for the People to claim due diligence in this respect—failure to simply include the first name or rank of a witness can only be ascribed to a failure to be thorough in their work.

Memo Books for 7 of the 10 Police Personnel Listed in the Certificate of Compliance

Memo books are among the materials required for disclosure by the prosecution. The prosecution must disclose "All statements, written or recorded…made by persons who have evidence or information relevant to any offense charged or any potential defense thereto, including…notes of police and other investigators…" C.P.L. § 245.20(1)(e). As the court (and the prosecution) is aware, a police officer or detective's memo book is a written set of notes regarding their activities, in particular pertaining to the investigation and arrest of a suspect, in this case Ms. [redacted]. The law is again clear—the prosecution must turn over this material for their Certificate of Compliance to be valid unless it "cannot be disclosedbecause it has been lost, destroyed, or otherwise unavailable…despite diligent and good faith efforts, reasonable under any circumstances." C.P.L. § 245.50(3).

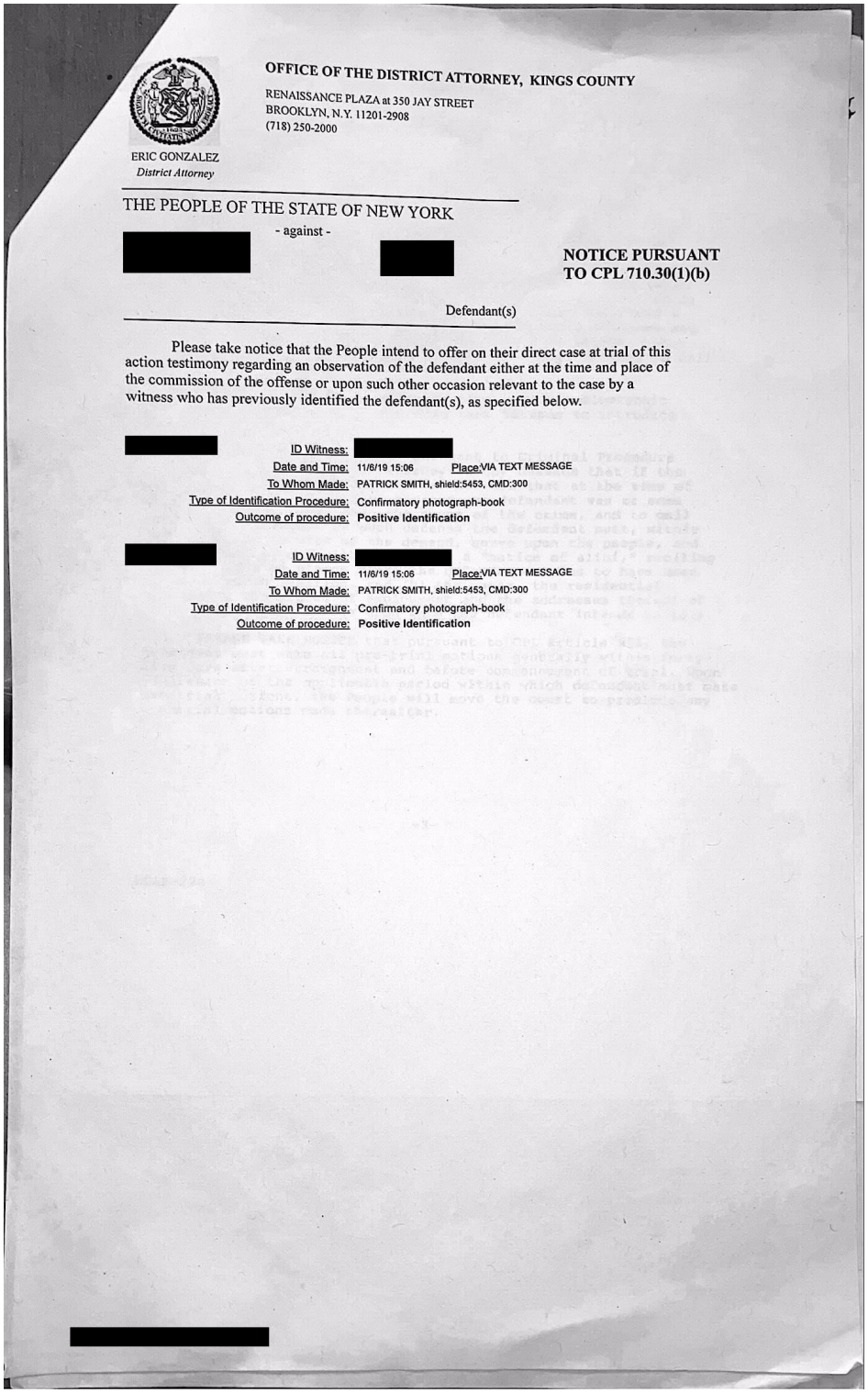
In this case, the People failed to provide the memo book of Sgt. Finamore in their initial Certificate of Compliance on Feb. 18, and have never provided any memo book for Officer Gaudio, Lietuenant Pelant, Officer Staab, Detective McKenna, Officer O'Malley, Detective McCarthy, or PAA Colon. The People assert that these officers, aside from Sgt. Finamore, "had no involvement in this case other than signing off on the typed reports and were not present at the scene…no further requests for their memo books were made." *People's Affirmation* at 12. It is contrary to the letter and spirit of C.P.L. § 245.20 for the People to decide what portions of automatic discovery are or are not required to be turned over to defense counsel—hence the title "Automatic." Logic dictates that anyone involved in the processing and writing up of a particular case may have knowledge pertaining to the investigation and arrest of that case's target. Allowing the People to merely assert that the content of otherwise automatic discovery is not relevant runs contrary to the clear objectives of § 245.20—the point of the discovery is to disclose the contents of these documents for defense review.

This bare assertion is indicative of the People's general attitude towards their failure to disclose material deemed required for disclosure by the New York State Legislature. It is noteworthy that, in their affirmation, the People claim that the discoverable material omitted from their disclosures to Ms. [redacted] is "of no consequence." *See People's Affirmation* at 14. That the People believe themselves the appropriate entity to make that determination contravenes the stated objectives C.P.L. § 245.20 and the separation of legislative, executive, and judicial functions inherent in New York's criminal justice system. If these materials are indeed of no consequence, then they will not be used by the defense or they will be barred from use at trial by a judge. But the legislature has made clear in requiring their disclosure that the "consequence" of discoverable material is to be determined not by the People but by the aforementioned non-prosecutorial entities. For the People to make their own determination as to whether materials mandated for discovery should be turned over to defense counsel usurps the authority of the legislature to dictate what materials must be disclosed and the authority of a judge to determine whether or not their contents are relevant to the case at hand.

In their affirmation, the People appear to misconstrue Ms. [redacted]' argument, stressing that the mere filing of a supplementary Certificate of Compliance does not render the previous Certificate of Compliance invalid, so long as the original was filed in good faith. *See People's Affirmation* at 14. However, that is not and never has been Ms. [redacted]' objection to their Certificate of Compliance. Her objection is to their past and present failure to provide her with the materials that the New York Legislature, in passing C.P.L. § 245.20, have deemed necessary for her to adequately prepare her defense and make a rational decision as to whether she intends to go to trial.

Given the failure of the People to turn over the abovementioned discovery, all of which is required to be turned over by the People to Defense Counsel within 15 days of arraignment, *see* C.P.L. §§ 245.10, 245.20, the Court must deem their Certificate of Compliance invalid and accompanying Statement of Readiness illusory.

EXHIBIT A



OFFICE OF THE DISTRICT ATTORNEY, KINGS COUNTY

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(718) 250-2000

ERIC GONZALEZ
District Attorney

THE PEOPLE OF THE STATE OF NEW YORK
- against -
[redacted] [redacted]

NOTICE PURSUANT TO CPL 710.30(1)(b)

Defendant(s)

Please take notice that the People intend to offer on their direct case at trial of this action testimony regarding an observation of the defendant either at the time and place of the commission of the offense or upon such other occasion relevant to the case by a witness who has previously identified the defendant(s), as specified below.

[redacted]
ID Witness: [redacted]
Date and Time: 11/6/19 15:06 Place: VIA TEXT MESSAGE
To Whom Made: PATRICK SMITH, shield:5453, CMD:300
Type of Identification Procedure: Confirmatory photograph-book
Outcome of procedure: **Positive Identification**

[redacted]
ID Witness: [redacted]
Date and Time: 11/6/19 15:06 Place: VIA TEXT MESSAGE
To Whom Made: PATRICK SMITH, shield:5453, CMD:300
Type of Identification Procedure: Confirmatory photograph-book
Outcome of procedure: **Positive Identification**

[redacted]

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WRITING SAMPLE

Drafted May 2017

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FROM: Dan Kieselstein
TO: Rigel Massaro
RE: Laws and Regulations Governing the Qualifications of Education Specialists
DATE: 5/24/2017

MEMORANDUM

I. Question Presented: What are the legal and policy advocacy strategies to increase teacher quality for students with disabilities, who are most impacted by California's teacher shortage?

Public Advocates identified the following sub-questions for legal analysis:

a. Can California laws and regulations governing the qualifications and preparation of teachers of special education students be leveraged to increase the competence of underprepared special education teachers? Are there implementing regulations of the IDEA that flesh out the special education teacher preparation requirements articulated in 20 U.S.C.A. § 1412(a)(14)(A)?
b. Can California laws and regulations governing intern credentialing programs be leveraged to better prepare special education intern teachers?
c. How does the legal regime governing special education teacher qualification compare to that governing requirements of teachers of English learners, as in Cal. Educ. Code §§ 44253.3 and 44253.4?
d. Does Everett v. Santa Barbara create a link between Rowley's basic floor of opportunity and teacher qualification sufficiently robust to be of use in challenging the proliferation of underprepared special education intern teachers?
e. Can federal laws and regulations governing the qualifications and preparation of teachers of special education students be leveraged to decrease use of "emergency-style" permits to fill education specialist teaching positions?
f. Does Everett v. Santa Barbara create a link between Rowley's basic floor of opportunity and teacher qualification sufficiently robust to be of use in challenging the proliferation of underprepared special education permit-holders?

II. Statement of the Problem

In California, demand for new teachers is growing and now nearly doubles supply. "New California credentials have remained constant at 11,500 since 2013-14, while project annual new hires have grown and now exceed 20,000." Desiree Carver-Thomas and Linda Darling-Hammond, Addressing California's Growing Teacher Shortage: 2017 Update, Learning Policy Institute, at *v* (Feb. 2017). To address this shortage, school districts have significantly increased their use of substandard credentials and permits, including intern credentials (such as Teach for America fellows) and "emergency-style permits" known as Provisional Internship Permits (PIPs), Teaching Permits for Statutory Leave (TPSLs), and Short-Term Staff Permits (STSPs). Id. at *v*. Lax governance of intern credentialing programs has meant that many intern credential holders are woefully underprepared to teach special education, see Commission on Teacher Credentialing, Education Specialist Teaching and Other Related Services Credential Program Standards (2015), infra and the emergency-style permits, in some cases, require no specialized preparation at all. See Provisional Intern Permits, Short Term Staff Permits, and Teaching Permits for Statutory Leave, Commission on Teacher Credentialing, infra.

Though this trend is worsening in a number of subject areas, it has manifested most dramatically in special education, "…by 2015-16, nearly two thirds (64%) held substandard authorizations. In no other

major teaching field do interns, permits, and waivers make up a majority of new teachers," Carver-Thomas & Darling-Hammond at 8, and this shortage is consistent across special education sub-specialties. "Among new special education teachers, underprepared entrants outnumber fully prepared entrants in nearly every special education sub-specialty." Id. at 9. The trend is also worsening. "In every sub-specialty, a greater portion of new teachers held substandard authorizations in 2015-16 than did in 2011-12. In other words, special education shortage conditions have been getting worse over time and across the board." Id. at 9.

This problem is compounded by the outsized importance of teacher preparation in providing effective special education, which the LPI report discusses at length:

> "Teacher preparation is important for all students, but it is even more critical to the success of children with special needs. Research has found that special education training significantly improves teachers' capacity to effectively teach students with special needs…Those teachers who are not prepared to meet the needs of their students struggle to manage the classroom and may inadvertently elicit challenging behaviors from students that lead to classroom disruption, restraint and seclusion, and other outcomes that negatively impact student learning and well-being. Id. at 7.

The shortage of qualified special education teachers also disproportionately affects unduplicated pupils. "In addition, shortages in special education are most likely to disproportionately affect English Learners, who are overrepresented in special education by nearly 30%, and Black students, who are overrepresented in special education by nearly 50%." Id. at 7. This paper reviews the legal and advocacy options available to advocates aiming to increase the preparation required of special education teachers in California.

III. Discussion Part I: Interns

Below, each of the sub-questions pertaining to intern teachers is addressed and accompanied by suggestions for legal action or policy advocacy to improve their preparation and support in California. The next section completes a similar analysis regarding the widespread use of "emergency-style" permits to fill vacant education specialist positions.

a. California laws and regulations governing special education do not offer a legal basis for facially challenging the preparation and support of underprepared special education interns

Legal Analysis

Special education programs are governed by Part 30 of California's Education Code, which is designed to mirror the educational standards regarding special education in the IDEA. "It is the further intent of the Legislature that this part does not abrogate any rights provide to individuals with exceptional needs and their parents or guardians under the federal IDEA. It is also the intent of this Legislature that this part does not set any higher standard of educating individuals with exceptional needs than that established by Congress under the IDEA." Cal. Educ. Code § 56000(e) (West 2007).

Mere statements of intent do not, of course, place California in compliance with the IDEA, especially if California accepts federal assistance under its auspices. If California does receive federal assistance in educating children with disabilities, it must submit a plan to the Secretary of Education ensuring that it is in compliance the IDEA. "Congress…conditions federal assistance upon a State's compliance with the substantive procedural goals of the Act. Accordingly, States seeking to qualify for federal funds must… file with the Secretary of Education formal plans mapping out in detail the programs, procedures, and timetables under which they will effectuate these policies." Honig v. Doe, 108 S. Ct. 592, 597 (U.S. 1988).

To meet this requirement, California places responsibility for ensuring conformity of special education policies, procedures, and programs with state laws and regulations, and therefore with the IDEA, lies with each special education local plan area (SELPA). Cal. Educ. Code § 56205(a) (West 2007). This section explicitly includes a responsibility to ensure that special education teachers meet qualifications standards outlined under state and federal law. Under § 56205, the local plan areas must ensure that their local plans are in compliance with state and federal law and regulations regarding "personnel qualifications to ensure that personnel, including special education teachers and personnel and paraprofessionals providing related services, necessary to implement this part are appropriate and adequately prepared and trained in accordance with §§ 56058 and 56070 [of the Cal. Educ. Code] and §§ 1412(a)(14) and 1413(a)(3) of Title 20 of the United States Code." Cal Educ. Code § 56205(a)(13) (West 2007).

Whether an aggregation of SELPAs satisfies California's obligation under §§ 1401, 1412-13 is unclear. The IDEA requires only that the State's plan "provide assurances to the Secretary [of Education] that the State has in effect policies and procedures to ensure" that the State meets certain conditions. 20 U.S.C. § 1401(a). Regulations promulgated under this statute's authority are no more precise. "A State is eligible for assistance under part B of the Act for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets the conditions in §§ 300.101-300.176." 34 C.F.R. § 300.100. The text's apparent grant of discretion to the Secretary of Education has led to a paucity of cases evaluating state action on that standard; cases focus instead on whether past treatment of disabled students is consistent with the IDEA's mandates. See, e.g., Corey H. v. Board of Educ. of City of Chicago, 995 F.Supp. 900 (N.D. Ill. 1998). As such, ascertaining precisely what constitutes an acceptable plan is difficult.

Individual SELPAs aim to meet the "assurances" requirement by offering an "Assurance Statement" indicating that the LEA's policies are in line with those required under federal law. See Local Plan for Special Education, Sacramento City Unified School District, at 7 (2007). SELPAs also reiterate California's devolution of responsibility to local plan areas under California law, explicitly designating the district's School Board as responsible for governance of the special education plan, see id. at 14, but also noting that other agencies may contract with SCUSD if necessary "to meet the requirements of applicable federaland state law." See id. at 16. Given the emphasis of the individual SELPAs on meeting requirements of federal law in their area, it seems probable that an aggregation of these SELPAs is sufficient to "provide assurance" to the Secretary of Education as required under § 1401.

Because both of these state laws—and the federal laws that they are designed to mirror— seem to allow for use of underprepared intern educators to teach special education, they would not represent a 'legal hook' to challenge lax governance of special education intern programs. Section 56058's requirement that teachers meet the "highly qualified" requirements defined in 20 U.S.C. § 1401(a)(10) is of little use because that federal statute has since been repealed and the regulatory framework resting upon its authority has not yet been updated. 20 U.S.C. § 1401(a)(10) (Repealed 2015). Section 56070's requirement thatqualifications for special education teacher meet the standards of 20 U.S.C. § 1412 mandates only that thequalifications are "consistent with state-approved or state-recognized certification" requirements and thatpersonnel are "highly qualified" (a standard that is no longer bound by any clear definition and, in any case, includes non-certified intern teachers. See Pub. L. No 111-322, § 163 (2010); Cal. Educ. Code § 56070 (West 2007).[1]

[1] It is worth noting that 34 C.F.R. § 300.156 fleshes out the requirements imposed upon State Education Agencies by § 1412(a)(14), but it does not do so in a way that would impose any additional requirements upon the state now that "highly qualified" has ceased to exclude non-certified interns. The regulation does reiterate that special education teachers are "appropriately and adequately prepared and trained,

Opportunity for Advocacy: Advocating for specialty areas for interns and developing more robust specialization preparation for PIP/STIP holders.
As noted above, a number of different Specialist Credentials exist for Special Education instructors that do not exist for interns, and do not require any preparation for STSP or PIP holders. This represents an opportunity for advocacy; there is no reason why interns have any less of a need for specialized credentials and the training that obtaining those credentials would require. The *Education Specialist Teaching and Other Related Services Credential Program Standards* promulgated by the CTC have developed lengthy content-based specialty standards reflecting the widely varying techniques and approaches needed to teach students with different types of disabilities. Exempting interns from preparation in these specialized areas is no less harmful than would be doing the same for teachers undergoing the normal credentialing process. This policy should be changed.

b. California laws and regulations governing intern programs do not appear to offer a legal basis for strengthening special education university intern preparation, but they may offer a legal basis for challenging the support provided to special education district interns.

Legal Analysis
California law allows for two forms of internship credentialing programs for teachers, district internships, see Cal. Educ. Code § 44325, and university internship programs, see Cal. Educ. Code § 44452. Both fall under the oversight of the Commission on Teacher Credentialing (CTC). "The commission shall…adopt a framework and general standards for the accreditation of preparation programs for teachers and other certified educators…". Cal. Educ. Code § 44225(h). Though the California Legislature specifically intended for the Commission to encourage the development of university internships, see Cal. Educ. Code § 44225(o) ("It is the intent of the Legislature that the commission encourages colleges and universities to design and implement…concentrated internship programs for persons who have attained a bachelor's degree in the field in which they intend to teach."), the CTC was also charged with ensuring that those programs meet the accreditation requirements outlined in §§ 44370-44376. See id.

Section 44370 makes clear the California Legislature's recognition of the importance of adequate teacher preparation. "The Legislature finds and declares that the competence and performance of professional educators depends in part on the quality of their academic and professional preparation." Cal. Educ. Code § 44370. To ensure program quality, the Legislature created a Committee on Accreditation to be comprised of members appointed by the CTC. Cal. Educ. Code § 44372(d). Regulations promulgated under these statutes' authority require education specialist accreditation programs to be "based on" the *Education Specialist Teaching and Other Related Services Credential Program Standards*. 5 CA ADC § 80033(c)(5)(B). These standards, and Teach for America's possible non-compliance with them, is detailed in Kimberly's previous memo.

Aside from these regulations, there exists an incongruity between requirements of district and university internship credentialing programs that is reflected in the statutory framework governing teacher

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including that those personnel have the content knowledge and skills to serve children with disabilities", but part (b) of the regulation seems to consider this requirement satisfied so long as the qualifications for the position are "consistent with any state-approved or state-recognized certification, licensing, registration, or comparable requirements that apply to the professional discipline in which those personnel are providing special education," 34 C.F.R. § 300.156 (2006), which means that, in the absence of a forceful definition of "highly qualified", the regulation essentially imposes no requirements at all.

preparation, **but not** in the program standards promulgated under the authority of its corresponding regulations. The statutes and resulting standard mandate that both types of program include 120 hours of pre-service preparation, 144 hours support and supervision, and "additional instruction," for interns teaching K-6, in child development and teaching methods and special education programs for children with mild/moderate disabilities. See Preconditions for California Educator Preparation Programs, Commission on Teacher Credentialing, 8-9 (2014). Under § 44830.3, however, district interns are subjectto another requirement not imposed upon university interns: an "additional 120 clock hours of mandatorytraining and supervised fieldwork that shall include, but not be limited to, instructional practices, and theprocedures and pedagogy of both general education programs and special education programs that teach pupils with disabilities" to be made part of their professional development plans. Cal. Educ. Code § 44830.3(b)(7). There is no similar requirement for university interns teaching students with disabilities.

Opportunity for advocacy: Ensure all district intern requirements are reflected in CTC regulations, and impose these same requirements on university interns.
First, the CTC should be asked to demonstrate that this statutory mandate is indeed reflected in its intern credentialing regulations. If the CTC cannot demonstrate this, this omission should (and, legally, must) be rectified. Second, policymakers should be pushed to equalize requirements between university and district interns. Enforcing this requirement on one category of interns but not another could be justified if university interns received substantially better preparation than their district counterparts through their credentialing process but, as interviews with TFA alumni have shown, this cannot be the case. If the legislature saw fit to require this additional training of district interns, there is no argument that the same logic would not apply to university interns, whose preparation regime does not appear to compensate for the absence of the additional 120 hours in any way.

CTC regulations are in this case inconsistent with state law. "In addition to requirements set forth in paragraphs (1) to (6), inclusive, the professional development plan for district interns teaching in special education programs shall also include 120 clock hours of mandatory training and supervised fieldwork that shall include, but not be limited to, instructional practices, and the procedures and pedagogy of both general education and special education programs that teach pupils with disabilities." Cal. Educ. Code § 44830.3(b)(7). These additional 120 hours are simply absent from CTC preconditions, regulations, andstandards governing district intern preparation. § 44830.3(b)(7) therefore offers a clear and unique legal pathway to force the CTC to increase required preparation for a subset of education specialists. There is no other advocacy strategy identified in this memo with a stronger legal basis for action.

Less clear is the potential impact of this strategy, for two reasons. First, because this requirement does not apply to university interns, the impact of this strategy is predicated on the proportion of intern credential candidates that achieve that credential through the district intern pathway. Because university interns make up over 80% of total interns training to be education specialists, see Commission on Teacher Credentialing, Teacher Supply in California (2015), the impact of this advocacy strategy will necessarily be limited. Second, increasing the preparation required of district interns could have the adverse result of increased reliance on emergency-style permits, which require even less preparation than intern credentials. Emergency-style permit issuances are growing at the fastest rate of all substandard authorizations, see id. at 5, and making the district intern preparation process more onerous could accelerate that trend.

c. The additional preparation of and support for English Learner instructors mandated by California law does not appear to have an equivalent with regards to Special Education instructors.

As noted in the materials provided in support of this research, bilingual authorization must be authorized by statute. See Cal. Educ. Code § 44258.9(c)(4)(A). According to the relevant statutes, this authorization

cannot be simply added onto an intern credential. See Cal. Educ. Code §§ 44253.3 and 44253.4. This requirement, that additional training of some kind beyond the intern credentialing process take place for an intern to receive a bilingual authorization, resulted in new preparation and supervision regulations for interns teaching EL students. These requirements included, *inter alia*, 144 hours of mandated support during the school year, 45 hours of mentoring and coaching from a mentor teacher with an EL authorization, and content standards for pre-service training. See Kathryn Baron, State toughens regs for teaching English learners, EdSource, April 21, 2013.

There does not appear to be a statute specifically requiring additional training for education specialist interns beyond the general intern credentialing process. Regulations creating authorization for teaching special education cite instead § 44225, which is the statute granting the CTC broad authority to determine "the scope and authorization of credentials" and supplementary authorizations generally. See, e.g., 5 Cal. Code of Regs. § 80046.5. Pursuant to this authority, the CTC does require instructors of special education students to have specific authorizations "that [authorize] teaching the primary disability of the students within the special education setting…". 5 Cal. Code of Regs. § 80046.5. To this end, there exist a number of different Specialist Instruction Credentials, such as "Mild/Moderate Disabilities," "Moderate/Severe," "Deaf and Hard-of-Hearing," "Autism Spectrum Disorders," and others, each with their own set of specialty standards. See Commission on Teacher Credentialing, Education Specialist Teaching and Other Related Services Credential Program Standards (2015). These distinctions do exist for the STSP and the PIP (albeit without any requisite training), but do not exist for the intern credential.

While the standards themselves appear robust, the method of or minimum hours spent on their delivery is not mandated by the regulations. Indeed, the standards need only "address" the specialty standards, language that would seem to allow for enormous variability in quality of preparation, particularly for underprepared teachers. Id. at 82. Additionally, many authorizations are considered to be automatically included with specialist credentials to which the authorizations appear only tangentially related. Id. at *vi*. For example, the Early Childhood Special Education Credential automatically confers upon its recipients the Autism Spectrum Disorders Authorization and Emotional Disturbance Authorization. Id. This compounds the problem: already underqualified intern teachers are authorized to instruct pupils for whom specialized knowledge is even more necessary. It also, absent a statutory equivalent to that protecting the rights of English Learners, appears to be sanctioned by California Law.

Opportunity for Advocacy: Equalizing preparation requirements for Specialist Interns with EL Interns
Though interns in any case must receive 120 hours of pre-service training and 144 hours of support during the year, English Learner interns face additional requirements specific to their field of instruction. This includes 45 additional hours per year of support, mentoring, and coaching specifically focused on teaching English learners from a mentor teacher who has an English learner authorization. Though these additional requirements were enacted pursuant to a statutory mandate that does not exist for Education Specialists (as noted above), there is an opportunity for advocacy to equalize both preparatory schemes. Special education requires a body of knowledge no less specialized than that of required of English Learner classes, and need amplified by the wide variety of disability types and levels of severity. Mandates levels of mentoring, support, and coaching geared specifically towards absorption of that knowledge would appear to be a necessary prerequisite to ensuring special education is provided effectively.

d. Everett's focus on whether or not a teacher has a special education credential, rather than whether or not those credentials have made the teacher genuinely qualified to teach students with disabilities, limits its usefulness as a basis for challenging lax intern credentialing schemes.

The Court in Everett focuses not on the level of qualification of a given teacher, but whether the teacher had undergone any special education training at all. "The failure to provide any special education

instruction for a significant segment of the year compels the conclusion that the services provided were not reasonably calculated to provide educational benefit." Everett v. Santa Barbara High School Dist., 28 Fed.Appx. 683 (9th Cir. 2002). The Court specifically contrasts this with the District's provision of a special education teacher at the end of this time period. "Only in March did Santa Barbara send someone qualified to provide special education services." Id. The Court made no inquiry into the quality of the credentialing of that teacher, and noted specifically that the District only "dropped below [the] basic floor when it failed to provide Robert (the plaintiff) access to a special education teacher (and, for a time, *any* instruction) for the majority of the 1994-95 school year." Id. Litigation considering teachers who have completed the state-mandated credentialing process, however inadequate that process may be, would thus appear to be distinguishable from the Everett holding.[23] This is especially true in light of the disappearance of "highly qualified" as a requirement for teachers, who would appear to be considered adequately prepared so long as they complete any credentialing process approved by the state.

Opportunity for Advocacy: The Everett holding does not appear to offer a basis for advocacy with regards to intern preparation or support.

IV. Discussion Part II: Emergency-Style Permits

e. Federal laws and regulations may provide a legal basis for challenging the widespread use of Provisional Intern Permits (PIPs), Short-Term Staff Permits (STSPs), and Teaching Permits for Statutory Leave (TPSLs).

Legal Analysis
All three of these permit types are inconsistent with federal law. Under 20 U.S.C. § 1412(a)(14)(C), State Education Agencies (SEAs) must "ensure that each person employed as a special education teacher in the State who teaches elementary school, middle school, or secondary school has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis." 20 U.S.C. § 1412(a)(14)(C)(ii). This provision gives substance to the requirement in § 1412(a)(14)(A) that SEAs "[establish and maintain] qualifications to ensure that personnel necessary to carry out this subchapter are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities." 20 U.S.C. § 1412(a)(14)(A). PIPs, STSPs, and TPSLs are all designed for the explicit purpose of allowing school districts to hire, as special education teachers, individuals who have not met the subject matter competence requirements needed to enter an intern program. See Provisional Intern Permits, Short Term Staff Permits, and Teaching Permits for Statutory Leave, Commission on Teacher Credentialing.[53]

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[2] The narrowness of Everett's holding and its lack of utility in bringing other suits is borne out by the infrequency with which it has been cited in other opinions: only twice in the 14 years since it's issuance, with both citations regarding its discussion of awarding compensatory education costs, rather than its consideration of where the "basic floor" of opportunity for special education students lies.

[3] Requirements are instead limited to (1) possession of a baccalaureate degree or higher from an accredited college, (2) passage of basic skills requirements (identical for regular and specialist instructors), and (3) successful completion course work for the permit type requested. In the case of both PIPs and STSPs for Education Specialists, this third requirement can be satisfied if the individual verifies three years of full or part-time classroom experience working with special education students (which includes work as an aid) or can verify a minimum of nine semester units of course work in special education or a combination of special education and general education.[5] Id. Notably, the course work requirement for any of the permits can also be satisfied if the individual satisfies the course work

Though these permits were created to *replace* emergency permits (deemed inconsistent with the now-meaningless 'highly qualified' requirement under No Child Left Behind), they nonetheless constitute a waiver of credentialing requirements mandated by the state. "[The PIP] allows an employing agency to fill an immediate staffing need by hiring an individual who has not yet meet the subject matter competence requirement needed to enter an intern program." Provisional Intern Permits, Committee on Teacher Credentialing. STSPs would seem to constitute an emergency waiver of certification requirements; though created to replace emergency permits, they exist to "[allow] an employing agency to fill an *acute staffing need*." Short-Term Staff Permit, Commission on Teacher Credentialing. TPSLs also allow for hiring of an individual who has not met the normal credentialing requirements for education specialists. See Temporary Permit for Statutory Leave, Committee on Teacher Credentialing. These seem clearly to constitute emergency, temporary, or provisional waivers of required credentialing in all but name.

Even without § 1412(a)(14)(C)'s explicit bar of waived credentials, PIPs and STSPs may be barred by § 1412(a)(14)(A), which requires education specialists "have the content knowledge and skills to serve children with disabilities." 20 U.S.C. § 1412(a)(14)(A). PIPs and STSPs, as noted above, require no specialized preparation, and employer training obligations imposed upon employers by the CTC as a remedy for this absence are vague and largely toothless. For PIP holders, the employer must provide "orientation, guidance and assistance to the permit holder," must assist the permit holder in developing a personalized plan to reach subject matter competence, must assist the permit holder in seeking and enrolling in subject matter training, such as workshops or seminars, and must only "apprise" the permit holder of steps to earn a genuine credential. Id. For STSP holders, the requirements of the employer are even more meagre. The employer must "[provide] orientation to the curriculum and to techniques of instruction and classroom management" to the permit holder and must assign a mentor teacher to the permit holder for term of the permit. Id. In both cases, the employing agency must verify that these steps have been taken. Id. The problem here is clear: the obligations mandate no concrete assessments or quantifiable benchmarks regarding preparation and development. California cannot, as such, provide assurances to the Secretary of Education that its policies are consistent with the IDEA's mandate that PIP and STSP permit holders have the specialized content knowledge they need. 20 U.S.C. §§ 1401, 1412. TPSLs, which do contain content-specific requirements[4], are likely permissible under this provision, if not under part C.

Opportunity for Advocacy 1: Challenge issuance of PIPs, STSPs, and TPSLs as unlawful under § 1412. These permits can be challenged under § 1412 because they are based upon a waiver of state credentialingrequirements. This is true even following the repeal of "highly qualified", because the qualifications of permit-holders are not consistent with State-approved requirements for the discipline, but instead constitute a waiver of those requirements. See, e.g. Provisional Internship Permit, Commission on Teacher Credentialing. Given California's teacher shortage, however a sudden and total

requirements of a Single Subject or Multiple Subject credential, which would imply that schools can hire, as education specialists, individuals that don't have any specialized background at all. Id.

[4] In this respect, regulation of TPSLs is somewhat more thorough. In addition to the requirements listed above, TPSL candidates must complete an initial 45 hours of TPSL preparation and, if they seek to renew the permit, must complete an additional 45 hours (up to 135 hours total). Types of substantive training, such as best practices in instruction and IEPs, pedagogy, and others, to be covered at each stage are outlined by the CTC in Coded Correspondence 16-10. Coded Correspondence 16-10. Commission on Teacher Credentialing (2016). The LEA must also provide the TPSL holder with two hours of mentoring/coaching and support per week, by a teacher fully credentialed in the TPSL-holder's authorization and classroom placement.

bar on their issuance may not be possible. One possible solution would be for the state to integrate the permits into theintern process, at which point they would be permissible under § 1412. "[F]ull State certification…includ[es] participating in an alternate route to certification as a special educator". 20 U.S.C. § 1412(a)(14)(C)(i). Given the shortcomings of intern preparation, this is hardly an ideal solution, but could at least impose greater content and preparation requirements on education specialists who, under the current framework, may receive no training at all. Another would be to phase the permits out over a period of time in conjunction with greater investment in education for special educators. In any case, the permits as they currently exist appear to be in violation of the IDEA and are thus vulnerable to legal challenge.

f. Everett *may provide a basis to challenge widespread use of emergency-style permits.*

Systematic waiving of required credentials may be inconsistent with the Everett ruling. "As the Supreme Court has made plain, 'the basic floor of opportunity provided by the IDEA consists of access to *specialized* instruction and related services." Everett v. Santa Barbara High School Dist., 28 Fed. Appx. 683, 685 (9th Cir. 2002) (citing Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 73 L.Ed.2d 690 (U.S. 1982). The Everett Court concluded that provision of a "regular teacher" did not meet this standard, which mandates provision of "a special education credentialed teacher." Id. Issuances of Short-Term Staff Permits and Provisional Intern Permits to teachers whose only qualification is completion of requirements for single subject or multiple subject permits—and who are, by definition, not credentialed—seems analogous to the unlawful provision of a "regular teacher" to teach special education in Everett, and is therefore likely barred under the ruling.

Opportunity for Advocacy: Challenge use of permits as inconsistent with Everett, rather than § 1412 andrecommend equalization of PIP and STSP preparation requirements with requirements for TPSLs. An Everett challenge to permits would look slightly different than one grounded in § 1412, because the Everett ruling was grounded in the Supreme Court's conclusion that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley 102 S. Ct. 3034, 3038 (U.S. 1982). Though the Everett Court held that failing to provide a special education credentialed teacher implied that this floor was not met, it also arrived at that conclusion by comparing provision of a fully credentialed special education teacher to a "regular" teacher or to no teacher at all. Everett v. Santa Barbara High School Dist., 28 Fed. Appx. 683, 685 (9th Cir. 2002). The difference, the Court noted, wasthat neither of these options involved instruction from someone "qualified to provide special educationservices." Id.

Though STSP and PIP holders, as noted above, would seem to fall below the Everett floor, there is room for ambiguity as to whether TPSL holder, having completed the (admittedly brief) training that that permit requires, would be similarly classified. Should a Court find that the training for TPSL holders satisfies this floor, the remedy imposed would likely differ from one imposed following a challenge made under § 1412—it could lead to an equalization of requirements across permit types, rather than an abolition of permits entirely. Under this type of ruling, PIP and STSP holders would receive the same additional training (perhaps also in 3 sets of 45-hour increments) that TPSL holders do, and their eligibility to complete a full year of teaching should be contingent on this additional training. The requirements imposed on both sets of permit holders should be equalized accordingly. Though less sweeping than the across-the-board prohibition on temporary permits that may result from a § 1412 challenge, this outcome could still be strongly beneficial (and may be more within California's current capacity for change).

As California's teacher shortage becomes more acute, districts are forced to race to the bottom in search of the least credentialed teachers available. This trend is exacerbated in poorer districts. "While districts can entice teachers in a variety of ways, unless the supply is adequate, successful districts ultimately poach teachers from other districts around the state. In doing so, well-resourced districts and schools often shift teachers away from under-resourced districts and schools…". See id. at 14. Ensuring better specialist instruction in low-resource districts therefore requires that the "floor" for preparation be raised. That "floor" is comprised of PIP and STSP permit holders.

Equalizing PIP and STSP preparation with that required of TPSL holders is a logical way to accomplish this. As noted above, TPSL requirements are relatively robust: they must complete an initial 45 hours of preparation and, in seeking to renew their permit, must complete an additional 45 hours (up to 135 hours overall). Though this is by no means a comprehensive preparatory scheme, imposing it upon PIP and STSP candidates would dramatically increase the level of preparation of these emergency specialists. It would also ensure that advocacy improves the level of instruction at low-resource districts, rather than improving the quality of candidates who may primarily end up in districts with lesser levels of need.

Conclusion

California's increasingly acute teacher shortage has resulted in particularly pronounced shortages of special education teachers, whose students are disproportionately high-needs students and students of color. Turning to unqualified teachers is both inadequate as a response and inconsistent with federal law. This paper outlines the legal and policy advocacy strategies available to align California's special education system with the IDEA's mandates and improve the quality of teaching to all of CA's special education students. Because of their clear inconsistency with federal law and growing use statewide, I view emergency permits, rather than intern credentials, as far more vulnerable to legal challenge and holding more potential sweeping change. A challenge to their issuance under either § 1412 or Everett should result in either greatly strengthened prerequisites or sharp decreases in their use, perhaps phased over time to allow California time to make a greater investment in its education specialist workforce.